

Message

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**From:** Goffman, Joseph [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23474D598E8D4EDFA9214A5991F2935B-GOFFMAN, JO]  
**Sent:** 9/29/2021 12:46:28 PM  
**To:** Hoffer, Melissa [Hoffer.Melissa@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]; Weaver, Susannah [Weaver.Susannah@epa.gov]  
**Subject:** RE: MATS

Thanks for the heads up.

Joseph Goffman  
Acting Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

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**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
**Sent:** Wednesday, September 29, 2021 8:45 AM  
**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>; Weaver, Susannah <Weaver.Susannah@epa.gov>  
**Subject:** MATS

**Ex. 5 Deliberative Process (DP)**

Melissa A. Hoffer  
Acting General Counsel  
Principal Deputy General Counsel  
U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202.440.1671  
E: hoffer.melissa@@epa.gov

## Message

**From:** Goffman, Joseph [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23474D598E8D4EDFA9214A5991F2935B-GOFFMAN, JO]  
**Sent:** 10/5/2021 9:01:41 PM  
**To:** Hoagland, Christopher R. EOP/OMB  
**Subject:** RE: Check in Tuesday AM

Ex. 6 Personal Privacy (PP)

Thanks, Chris.

Joseph Goffman  
 Acting Assistant Administrator  
 Office of Air and Radiation  
 U.S. Environmental Protection Agency

**From:** Hoagland, Christopher R. EOP/OMB  
**Sent:** Tuesday, October 5, 2021 5:00 PM  
**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Subject:** RE: Check in Tuesday AM

Ex. 6 Personal Privacy (PP)

Ex. 5 Deliberative Process (DP)

**From:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Sent:** Tuesday, October 5, 2021 9:57 AM  
**To:** Hoagland, Christopher R. EOP/OMB  
**Subject:** RE: Check in Tuesday AM

Ex. 6 Personal Privacy (PP)

One other item

Ex. 5 Deliberative Process (DP)

Joseph Goffman  
 Acting Assistant Administrator  
 Office of Air and Radiation  
 U.S. Environmental Protection Agency

**From:** Goffman, Joseph  
**Sent:** Monday, October 4, 2021 8:00 PM  
**To:** Hoagland, Christopher R. EOP/OMB  
**Subject:** RE: Check in Tuesday AM

Ex. 6 Personal Privacy (PP)

Will call you in the AM. Thanks.

Joseph Goffman  
 Acting Assistant Administrator  
 Office of Air and Radiation  
 U.S. Environmental Protection Agency

**From:** Hoagland, Christopher R. EOP/OMB  
**Sent:** Monday, October 4, 2021 7:49 PM  
**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Subject:** Check in Tuesday AM

Ex. 6 Personal Privacy (PP)

Hi Joe,

If you're able to briefly touch base in the morning I would appreciate a quick call — Ex. 6 Personal Privacy (PP) I can step out anytime except 9:30-10.

Thanks,  
Chris

## Message

**From:** Goffman, Joseph [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23474D598E8D4EDFA9214A5991F2935B-GOFFMAN, JO]  
**Sent:** 9/22/2021 3:31:46 PM  
**To:** Hoffer, Melissa [Hoffer.Melissa@epa.gov]; Campbell, Ann [Campbell.Ann@epa.gov]  
**CC:** Weaver, Susannah [Weaver.Susannah@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Marks, Matthew [Marks.Matthew@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]  
**Subject:** RE: MATS

## Ex. 5 Deliberative Process (DP)

Joseph Goffman  
 Acting Assistant Administrator  
 Office of Air and Radiation  
 U.S. Environmental Protection Agency

**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
**Sent:** Wednesday, September 22, 2021 11:23 AM  
**To:** Campbell, Ann <Campbell.Ann@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Cc:** Weaver, Susannah <Weaver.Susannah@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>  
**Subject:** RE: MATS

Yes, there was that discussion, and giving time to reach out to stakeholders, TBD following discussion with OMB.

**From:** Campbell, Ann <Campbell.Ann@epa.gov>  
**Sent:** Wednesday, September 22, 2021 11:06 AM  
**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Cc:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>; Weaver, Susannah <Weaver.Susannah@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>  
**Subject:** Re: MATS

I understand there was discussion at today's morning staff meeting to rollout MATs next week, likely Thursday, kicking off Children's Health Month. Joe and Vicki are talking to OMB this morning and will recommend clearance next Wednesday for signature/rollout Thursday.

Ann (Campbell) Ferrio  
 Chief of Staff  
 Office of Air and Radiation  
 (202) 566-1370

On Sep 22, 2021, at 11:00 AM, Goffman, Joseph <Goffman.Joseph@epa.gov> wrote:

Adding Ann. Let us check on a couple of things as we just heard something slightly different. Thanks.

Joseph Goffman  
 Acting Assistant Administrator  
 Office of Air and Radiation

U.S. Environmental Protection Agency

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**From:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>  
**Sent:** Wednesday, September 22, 2021 10:57 AM  
**To:** Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Cc:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Carbonell, Tomas <[Carbonell.Tomas@epa.gov](mailto:Carbonell.Tomas@epa.gov)>  
**Subject:** MATS

MATS has been cleared and OP reports it appears it will be signed Friday.

Melissa A. Hoffer  
Acting General Counsel  
Principal Deputy General Counsel  
U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202.440.1671  
E: [hoffer.melissa@@epa.gov](mailto:hoffer.melissa@@epa.gov)

## Message

**From:** Goffman, Joseph [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23474D598E8D4EDFA9214A5991F2935B-GOFFMAN, JO]  
**Sent:** 1/6/2022 2:23:19 PM  
**To:** Schwartz, Jason A. EOP/OMB [Ex. 6 Personal Privacy (PP)]  
**Subject:** RE: Couple of more items to flag

No worries, Jason. Feel free to call when you can. Thanks.

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

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**From:** Schwartz, Jason A. EOP/OMB [Ex. 6 Personal Privacy (PP)]  
**Sent:** Thursday, January 6, 2022 9:10 AM  
**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Subject:** RE: Couple of more items to flag

Hi Joe,

Sorry I missed you yesterday. My day is pretty packed today, could we talk later this afternoon or evening?

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**From:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Sent:** Wednesday, January 5, 2022 4:45 PM  
**To:** Schwartz, Jason A. EOP/OMB [Ex. 6 Personal Privacy (PP)]  
**Subject:** Couple of more items to flag

## Ex. 5 Deliberative Process (DP)

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

## Message

**From:** Goffman, Joseph [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23474D598E8D4EDFA9214A5991F2935B-GOFFMAN, JO]  
**Sent:** 1/9/2022 11:11:02 PM  
**To:** Culligan, Kevin [Culligan.Kevin@epa.gov]  
**CC:** Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Profeta, Timothy [Profeta.Timothy@epa.gov]  
**Subject:** RE: ACE - OSG Draft Brief

## Ex. 5 Deliberative Process (DP)

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

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**From:** Culligan, Kevin <Culligan.Kevin@epa.gov>  
**Sent:** Sunday, January 9, 2022 6:02 PM  
**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Cc:** Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Profeta, Timothy <Profeta.Timothy@epa.gov>  
**Subject:** RE: ACE - OSG Draft Brief

Joe,

OAR staff are supposed to get thoughts to OGC by COB tomorrow. I will not be in much of this week and unfortunately will not be able to access my work e-mail, therefore Tim (added to the cc:), will be working with others in OAR to pull together a single set of staff level comments tomorrow. Overall, I did think this version was much better and I think we

## Ex. 5 Deliberative Process (DP)

# Ex. 5 Deliberative Process (DP)

- Kevin

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**From:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Sent:** Saturday, January 08, 2022 2:13 PM  
**To:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Cc:** Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>  
**Subject:** RE: ACE - OSG Draft Brief

Thanks, Kevin. I just finished reading the draft. Let me know if you see any issues we need to raise. Thanks, again.

Joseph Goffman  
 Principal Deputy Assistant Administrator  
 Office of Air and Radiation  
 U.S. Environmental Protection Agency

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**From:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Sent:** Saturday, January 8, 2022 2:11 PM  
**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Cc:** Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>  
**Subject:** Re: ACE - OSG Draft Brief

Thanks Joe. I am planning to review tomorrow

Sent from my iPhone

On Jan 8, 2022, at 8:18 AM, Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)> wrote:

Goffman, Joseph has shared a OneDrive for Business file with you. To view it, click the link below.

 [W Va 010722.1\\_circ - EPA Comments.docx](#)

Joseph Goffman  
 Principal Deputy Assistant Administrator  
 Office of Air and Radiation  
 U.S. Environmental Protection Agency

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**From:** Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>  
**Sent:** Friday, January 7, 2022 5:51 PM  
**To:** Prieto, Jeffrey <[Prieto.Jeffrey@epa.gov](mailto:Prieto.Jeffrey@epa.gov)>; Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Arroyo, Victoria <[Arroyo.Victoria@epa.gov](mailto:Arroyo.Victoria@epa.gov)>; Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Greenglass, Nora <[Greenglass.Nora@epa.gov](mailto:Greenglass.Nora@epa.gov)>; Vijayan, Abi <[Vijayan.Abi@epa.gov](mailto:Vijayan.Abi@epa.gov)>; Li,

Ryland (Shengzhi) <[Li.Ryland@epa.gov](mailto:Li.Ryland@epa.gov)>

**Subject:** ACE - OSG Draft Brief

Jeff, Joe, Vicki, & Jim,

Attached is the revised draft of the ACE brief that we received today from OSG. This version reflects the work of Malcolm Stewart, Deputy Solicitor General, and is being concurrently shared with the Solicitor General for her review. ARLO is actively reviewing this new draft, and would ask that you share any additional feedback you may have on by **COB Monday**.

While we are still reviewing, it is evident that many of our comments have been accepted, including as to the discussions of biomass, which we know is of particular interest. That said, we may wish to propose a few additional revisions on the subject to further ensure the Agency views are accurately represented, and we would welcome your perspective after you've reviewed.

Please let us know if you have any questions.

Best,  
Stephanie

Stephanie L. Hogan | Assistant General Counsel for the NSPS and Visibility Protection Practice Group | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

Pronouns: she/her/hers

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## Message

**From:** Goffman, Joseph [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=23474D598E8D4EDFA9214A5991F2935B-GOFFMAN, JO]  
**Sent:** 1/11/2022 11:12:44 PM  
**To:** Eun Kim (Kim.Eun@epa.gov) [Kim.Eun@epa.gov]  
**Subject:** FW: Power Plant Regs  
**Attachments:** 2022-1-6 Power Sector elements-timing V2.pptx

Joseph Goffman  
 Principal Deputy Assistant Administrator  
 Office of Air and Radiation  
 U.S. Environmental Protection Agency

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**From:** Utech, Dan <Utech.Dan@epa.gov>  
**Sent:** Tuesday, January 11, 2022 9:08 AM  
**To:** Lance, Kathleen <Lance.Kathleen@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Subject:** RE: Power Plant Regs

Joe – I think the three slides that you sent last week are good for the book and to have in reserve for use during Thursday's discussion.

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**From:** Lance, Kathleen <Lance.Kathleen@epa.gov>  
**Sent:** Tuesday, January 11, 2022 9:05 AM  
**To:** Utech, Dan <Utech.Dan@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Subject:** RE: Power Plant Regs  
**Importance:** High

Setting for 4:00PM on this Thursday.

**Joe – please connect with Dan on the what briefing materials are needed NLT 3:00PM tomorrow, Wed. 1/12.**

Kindly,

Kathleen C. Lance  
 Director of Scheduling and Advance  
 U.S. Environmental Protection Agency  
 Cell: (202) 941-1109

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**From:** Utech, Dan <Utech.Dan@epa.gov>  
**Sent:** Monday, January 10, 2022 9:32 PM  
**To:** Regina McCarthy <Regina.A.McCarthy@epa.gov> [Ex. 6 Personal Privacy (PP)]  
**Cc:** Thomas, Maggie M. EOP/WHO <Maggie.M.Thomas@epa.gov> [Ex. 6 Personal Privacy (PP)]; Ali Zaidi <Ali.A.Zaidi@epa.gov> [Ex. 6 Personal Privacy (PP)]; Lance, Kathleen <Lance.Kathleen@epa.gov>  
**Subject:** Re: Power Plant Regs

Thanks Gina - just one meeting for this week for starters and we can sort it out from there. Let's schedule for 30 mins( but it might take just 20). The administrator, me, Janet and Joe on our end. Adding Kathleen on our end.

On Jan 10, 2022, at 6:43 PM, McCarthy, Gina A. EOP/WHO <Regina.A.McCarthy@Ex. 6 Personal Privacy (PP)> wrote:

Maggie – Dan Utech called and wants to schedule weekly meetings – 20 minutes each – to connect on the power plan rulemakings at EPA. Can you work with Arianna on this?

Thanks

Gina

Message

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**From:** Hoffer, Melissa [Hoffer.Melissa@epa.gov]  
**Sent:** 9/21/2021 6:43:58 PM  
**To:** Weaver, Susannah [Weaver.Susannah@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Marks, Matthew [Marks.Matthew@epa.gov]  
**CC:** Goffman, Joseph [Goffman.Joseph@epa.gov]  
**Subject:** Update

MATS is expected to clear within the next few days. EPA sent the revised preamble and cost memo today,

Ex. 5 Attorney Client (AC)

Ex. 5 Attorney Client (AC)

Melissa A. Hoffer  
Acting General Counsel  
Principal Deputy General Counsel  
U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202.440.1671  
E: hoffer.melissa@@epa.gov

## Message

**From:** Culligan, Kevin [Culligan.Kevin@epa.gov]  
**Sent:** 9/2/2021 5:25:47 PM  
**To:** Hoffer, Melissa [Hoffer.Melissa@epa.gov]  
**CC:** Goffman, Joseph [Goffman.Joseph@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]; Weaver, Susannah [Weaver.Susannah@epa.gov]; Campbell, Ann [Campbell.Ann@epa.gov]; Koerber, Mike [Koerber.Mike@epa.gov]; Sasser, Erika [Sasser.Erika@epa.gov]; Ting, Kaytrue [Ting.Kaytrue@epa.gov]  
**Subject:** Re: Current version of the MATS preamble

Thanks Melissa. I will pass these comments along. This was definitely a team effort between OAR and OGC staff. It would not be anywhere near as good without the key roles played by Kaytrue and Paul.

Sent from my iPhone

On Sep 2, 2021, at 1:19 PM, Hoffer, Melissa <Hoffer.Melissa@epa.gov> wrote:

Kevin,

The preamble is looking really good—congratulations to everyone.

## Ex. 5 Attorney Client (AC)

Many thanks for incredible efforts all around!

Melissa

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**From:** Culligan, Kevin <Culligan.Kevin@epa.gov>  
**Sent:** Wednesday, September 1, 2021 5:56 PM  
**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>  
**Cc:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>; Weaver, Susannah <Weaver.Susannah@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Koerber, Mike <Koerber.Mike@epa.gov>; Sasser, Erika <Sasser.Erika@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Subject:** Current version of the MATS preamble

## Ex. 5 Deliberative Process (DP)

# Ex. 5 Deliberative Process (DP)

I have attached a sharepoint link – it is to the same version of the document that you have been previously commenting on.

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**From:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>

**Sent:** Wednesday, September 01, 2021 11:01 AM

**To:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Carbonell, Tomas <[Carbonell.Tomas@epa.gov](mailto:Carbonell.Tomas@epa.gov)>

**Cc:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>; Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>; Koerber, Mike <[Koerber.Mike@epa.gov](mailto:Koerber.Mike@epa.gov)>; Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>

**Subject:** RE: Update on MATS timing

Got it. Thanks, Kevin.

Joseph Goffman  
Acting Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

---

**From:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>

**Sent:** Wednesday, September 1, 2021 10:55 AM

**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Carbonell, Tomas <[Carbonell.Tomas@epa.gov](mailto:Carbonell.Tomas@epa.gov)>

**Cc:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>; Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>; Koerber, Mike <[Koerber.Mike@epa.gov](mailto:Koerber.Mike@epa.gov)>; Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>

**Subject:** Update on MATS timing

Joe,

# Ex. 5 Deliberative Process (DP)

- Kevin

## Message

**From:** Campbell, Ann [Campbell.Ann@epa.gov]  
**Sent:** 10/25/2021 7:33:49 PM  
**To:** Goffman, Joseph [Goffman.Joseph@epa.gov]; Hooper, Daniel [hooper.daniel@epa.gov]  
**Subject:** RE: Methane Timing Update

Got it.

**Ex. 5 Deliberative Process (DP)**

Ann (Campbell) Ferrio  
 Chief of Staff  
 EPA/Office of Air and Radiation  
 Office: 202 566 1370

**From:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Sent:** Monday, October 25, 2021 3:29 PM  
**To:** Campbell, Ann <Campbell.Ann@epa.gov>; Hooper, Daniel <hooper.daniel@epa.gov>  
**Subject:** FW: Methane Timing Update

The ADD Call is Saved!

Joseph Goffman  
 Acting Assistant Administrator  
 Office of Air and Radiation  
 U.S. Environmental Protection Agency

**From:** Utech, Dan <Utech.Dan@epa.gov>  
**Sent:** Monday, October 25, 2021 3:25 PM  
**To:** Hamilton, Lindsay <Hamilton.Lindsay@epa.gov>; Conger, Nick <Conger.Nick@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; McCabe, Janet <McCabe.Janet@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Cassady, Alison <Cassady.Alison@epa.gov>; Enobakhare, Rosemary <Enobakhare.Rosemary@epa.gov>  
**Subject:** Fwd: Methane Timing Update

Begin forwarded message:

**From:** "Sanchez, Roque T. EOP/WHO" <Roque.T.Sanchez@epa.gov> [Ex. 6 Personal Privacy (PP)]  
**Date:** October 25, 2021 at 3:14:55 PM EDT  
**To:** "Enobakhare, Rosemary" <Enobakhare.Rosemary@epa.gov>, "Cortez Russell, Loni" <Russell.Loni@epa.gov>, "Utech, Dan" <Utech.Dan@epa.gov>, "Cassady, Alison" <Cassady.Alison@epa.gov>  
**Cc:** David Hayes <David.J.Hayes@epa.gov> [Ex. 6 Personal Privacy (PP)]; "Flegal, Jane A. EOP/WHO" <Jane.A.Flegal@epa.gov> [Ex. 6 Personal Privacy (PP)]  
**Subject:** Methane Timing Update

All,

We are now targeting Tuesday, 2 November, for administration methane announcements. Based on my conversation with OIRA today, their team still plans to substantively finish their work on the rules this week, and will then hold off on

official review conclusion pending an announcement date. I acknowledge that this is a bit of a moving target so feel free to call with any questions [Ex. 6 Personal Privacy (PP)]

VR,  
Roque

--

**Roque Sanchez (he/him)**

Policy Advisor

White House Climate Policy Office

[Ex. 6 Personal Privacy (PP)]

roque.t.sanchez@

[Ex. 6 Personal Privacy (PP)]

## Message

**From:** Shaw, Betsy [Shaw.Betsy@epa.gov]  
**Sent:** 11/2/2021 12:18:44 PM  
**To:** Goffman, Joseph [Goffman.Joseph@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]; Nunez, Alejandra [Nunez.Alejandra@epa.gov]; Kim, Eunjung [Kim.Eun@epa.gov]; Campbell, Ann [Campbell.Ann@epa.gov]; Hooper, Daniel [hooper.daniel@epa.gov]  
**CC:** Shoaff, John [Shoaff.John@epa.gov]; Lubetsky, Jonathan [Lubetsky.Jonathan@epa.gov]; Donez, Francisco [Donez.Francisco@epa.gov]  
**Subject:** FW: EJ Legal Tools Draft for AA review: Comments due COB November 10th  
**Attachments:** DRAFT EJ Legal Tools for AA Review 11.1.21.docx; Redline version of 2011 EJ Legal Tools with 2021 updates.pdf

FYI. Francisco Donez in OAPPS can also collect and consolidate any comments you all have on the draft update of EJ Legal Tools. Shooting for COB Nov. 10<sup>th</sup>.

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**From:** Shaw, Betsy  
**Sent:** Tuesday, November 2, 2021 8:16 AM  
**To:** Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Koerber, Mike <Koerber.Mike@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Henning, Julie <henning.julie@epa.gov>; Grundler, Christopher <grundler.christopher@epa.gov>; Kocchi, Suzanne <Kocchi.Suzanne@epa.gov>; Edwards, Jonathan <Edwards.Jonathan@epa.gov>; Cherepy, Andrea <Cherepy.Andrea@epa.gov>  
**Cc:** Shoaff, John <Shoaff.John@epa.gov>; Lubetsky, Jonathan <lubetsky.jonathan@epa.gov>; Donez, Francisco <Donez.Francisco@epa.gov>  
**Subject:** FW: EJ Legal Tools Draft for AA review: Comments due COB November 10th

Hi all,

Attached for our review is the updated EJ Legal Tools document, helpfully in both clean and redline versions showing the changes from the original 2011 edition. OAPPS has graciously agreed to collect and consolidate our comments. Given the Veteran's Day holiday, it would be most helpful if you could send your comments to **Francisco Donez** in OAPPS by **COB Wednesday, November 10<sup>th</sup>** so we can meet OGC's November 15<sup>th</sup> deadline.

Thanks,

Betsy

---

**From:** Engelman-Lado, Marianne <EngelmanLado.Marianne@epa.gov>  
**Sent:** Monday, November 1, 2021 7:02 PM  
**To:** Hitchens, Lynnann <hitchens.lynnann@epa.gov>; Helm, Arron <Helm.Arron@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Shaw, Betsy <Shaw.Betsy@epa.gov>; Waterhouse, Carlton <Waterhouse.Carlton@epa.gov>; Breen, Barry <Breen.Barry@epa.gov>; Freedhoff, Michal <Freedhoff.Michal@epa.gov>; Keigwin, Richard <Keigwin.Richard@epa.gov>; Fox, Radhika <Fox.Radhika@epa.gov>; Arroyo, Victoria <Arroyo.Victoria@epa.gov>; Fine, Philip <Fine.Philip@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Nishida, Jane <Nishida.Jane@epa.gov>; Cherry, Katrina <Cherry.Katrina@epa.gov>; Nunez, Alejandra <Nunez.Alejandra@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>  
**Cc:** Serassio, Helen <Serassio.Helen@epa.gov>  
**Subject:** EJ Legal Tools Draft for AA review, etc

Deliberative

Dear Colleagues,

Please see attached for your review a deliberative draft of *EPA Legal Tools to Advance Environmental Justice*. The document updates *EJ Legal Tools*, released in 2011 and 2014, which identified EPA legal authorities providing opportunities to advance environmental justice. We are requesting your review by Monday, November 15<sup>th</sup>.

## Ex. 5 Attorney Client (AC)

While we appreciate that we're suggesting an ambitious timeframe, we are largely looking for you to identify any missed opportunities or "red flag" issues. Please note that the document is in draft form and that we will resolve formatting and editorial issues before we finalize the document. All along, we've said that our goal isn't just to produce a document but to make sure we develop a deliverable in a short timeframe that EPA can and will use as a resource as we advance the Administration's policy to achieve equity and environmental justice. Toward that end, our goal is to have a document ready for at least initial internal use before the end of the calendar year.

Your program staff provided informal feedback on an earlier draft, and both OGC and ORC staff have contributed to the document. These important updates were made under a quick timeline, and I want to express my gratitude for their steadfast efforts in getting the document ready for your review. I also want to thank Helen Serassio and the team at the Cross Cutting Issues Law Office, including Tricia Jefferson, Tom Marshall, Lisa Goldman, and Tracy Sheppard, among others for their leadership and coordination of this effort.

While the draft focuses on EPA's opportunities to advance environmental justice, it does not prescribe when and how the Agency should undertake specific actions. Indeed, we understand that there are resource constraints and other factors that affect the feasibility of any given action at any particular time. Nonetheless, we know it is critical to set forth where we have authority to take action. Note also that we see *Legal Tools* as a living document that we plan to update periodically to reflect emerging policy, experience, and changes in our authorities.

Upon completion of your review, please send one draft to me with a copy to Helen Serassio.

Thanks,

Marianne

Marianne Engelman-Lado  
Deputy General Counsel for Environmental Initiatives  
Office of General Counsel  
EPA  
202 480-5842 (cell)

## Message

**From:** Culligan, Kevin [Culligan.Kevin@epa.gov]  
**Sent:** 9/2/2021 8:03:03 PM  
**To:** Hoffer, Melissa [Hoffer.Melissa@epa.gov]  
**CC:** Goffman, Joseph [Goffman.Joseph@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]; Weaver, Susannah [Weaver.Susannah@epa.gov]; Campbell, Ann [Campbell.Ann@epa.gov]; Koerber, Mike [Koerber.Mike@epa.gov]; Sasser, Erika [Sasser.Erika@epa.gov]; Ting, Kaytrue [Ting.Kaytrue@epa.gov]  
**Subject:** Re: Current version of the MATS preamble

Will do.

Sent from my iPhone

On Sep 2, 2021, at 3:53 PM, Hoffer, Melissa <Hoffer.Melissa@epa.gov> wrote:

## Ex. 5 Deliberative Process (DP)

**From:** Culligan, Kevin <Culligan.Kevin@epa.gov>  
**Sent:** Thursday, September 2, 2021 3:53 PM  
**To:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>  
**Cc:** Weaver, Susannah <Weaver.Susannah@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Koerber, Mike <Koerber.Mike@epa.gov>; Sasser, Erika <Sasser.Erika@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Subject:** RE: Current version of the MATS preamble

## Ex. 5 Deliberative Process (DP)

**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
**Sent:** Thursday, September 02, 2021 1:19 PM  
**To:** Culligan, Kevin <Culligan.Kevin@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>  
**Cc:** Weaver, Susannah <Weaver.Susannah@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Koerber, Mike <Koerber.Mike@epa.gov>; Sasser, Erika <Sasser.Erika@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Subject:** RE: Current version of the MATS preamble  
**Importance:** High

Kevin,

The preamble is looking really good—congratulations to everyone.

To save time, I provide my two comments here, by e-mail.

## Ex. 5 Deliberative Process (DP)

# Ex. 5 Deliberative Process (DP)

Melissa

---

**From:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>

**Sent:** Wednesday, September 1, 2021 5:56 PM

**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Carbonell, Tomas <[Carbonell.Tomas@epa.gov](mailto:Carbonell.Tomas@epa.gov)>

**Cc:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>; Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>; Koerber, Mike <[Koerber.Mike@epa.gov](mailto:Koerber.Mike@epa.gov)>; Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>

**Subject:** Current version of the MATS preamble

# Ex. 5 Deliberative Process (DP)

I have attached a sharepoint link – it is to the same version of the document that you have been previously commenting on.

---

**From:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>

**Sent:** Wednesday, September 01, 2021 11:01 AM

**To:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Carbonell, Tomas <[Carbonell.Tomas@epa.gov](mailto:Carbonell.Tomas@epa.gov)>

**Cc:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>; Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>; Koerber, Mike <[Koerber.Mike@epa.gov](mailto:Koerber.Mike@epa.gov)>; Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>

**Subject:** RE: Update on MATS timing

Got it. Thanks, Kevin.

Joseph Goffman

Acting Assistant Administrator

Office of Air and Radiation

U.S. Environmental Protection Agency

---

**From:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>

**Sent:** Wednesday, September 1, 2021 10:55 AM

**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Carbonell, Tomas <[Carbonell.Tomas@epa.gov](mailto:Carbonell.Tomas@epa.gov)>

**Cc:** Hoffer, Melissa <[Hoffer.Melissa@epa.gov](mailto:Hoffer.Melissa@epa.gov)>; Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>; Koerber, Mike <[Koerber.Mike@epa.gov](mailto:Koerber.Mike@epa.gov)>; Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>

**Subject:** Update on MATS timing

Joe,

## Ex. 5 Deliberative Process (DP)

- Kevin

## Message

**From:** Carbonell, Tomas [Carbonell.Tomas@epa.gov]  
**Sent:** 11/2/2021 10:23:23 PM  
**To:** Campbell, Ann [Campbell.Ann@epa.gov]; Nunez, Alejandra [Nunez.Alejandra@epa.gov]  
**CC:** Goffman, Joseph [Goffman.Joseph@epa.gov]  
**Subject:** RE: Time Sensitive: Ethics Check for T Carbonell and A Nunez

Thank you!

---

**From:** Campbell, Ann <Campbell.Ann@epa.gov>  
**Sent:** Tuesday, November 2, 2021 5:45 PM  
**To:** Carbonell, Tomas <Carbonell.Tomas@epa.gov>; Nunez, Alejandra <Nunez.Alejandra@epa.gov>  
**Cc:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Subject:** FW: Time Sensitive: Ethics Check for T Carbonell and A Nunez

Ann (Campbell) Ferrio  
 Chief of Staff  
 EPA/Office of Air and Radiation  
 Office: 202 566 1370

---

**From:** Griffo, Shannon <Griffo.Shannon@epa.gov>  
**Sent:** Tuesday, November 2, 2021 5:43 PM  
**To:** Campbell, Ann <Campbell.Ann@epa.gov>  
**Cc:** Clarke, Victoria <clarke.victoria@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>  
**Subject:** RE: Time Sensitive: Ethics Check for T Carbonell and A Nunez

Doesn't look like any specific party matters, so no other questions from me. Thanks Ann!

Shannon Griffo  
 Office of General Counsel, Ethics Office  
 U.S. Environmental Protection Agency  
 (202) 564-7061

---

**From:** Campbell, Ann <Campbell.Ann@epa.gov>  
**Sent:** Tuesday, November 2, 2021 5:36 PM  
**To:** Griffo, Shannon <Griffo.Shannon@epa.gov>  
**Cc:** Clarke, Victoria <clarke.victoria@epa.gov>; Fugh, Justina <Fugh.Justina@epa.gov>  
**Subject:** RE: Time Sensitive: Ethics Check for T Carbonell and A Nunez

Thanks for your quick response Shannon and my apologies for the volume of requests all at once! The agenda for tomorrow's meeting is below. Please let me know if you have any additional questions.

Agenda

Welcome/Kickoff Discussion: Purpose, Objectives and Frequency of Meetings  
 OAR Updates  
 Power plants  
     MATS  
     111  
     Transport

SCRs

Mobile Sources

Cars - preemption and 2023-6

Trucks

SSM

Ann (Campbell) Ferrio  
Chief of Staff  
EPA/Office of Air and Radiation  
Office: 202 566 1370

---

**From:** Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>  
**Sent:** Tuesday, November 2, 2021 5:34 PM  
**To:** Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>  
**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Subject:** RE: Time Sensitive: Ethics Check for T Carbonell and A Nunez

Hi Ann,

For this one, I'd just want to know what the subject of the roundtable discussion is going to be. Presuming it's not a specific party matter, and it's a matter of general applicability (rule or policy), then yes, they may both participate given what you've described below.

And thanks for flagging the time sensitivity of this question. It's helpful for me to know which to respond to first!

Thanks,  
Shannon

Shannon Griffo  
Office of General Counsel, Ethics Office  
U.S. Environmental Protection Agency  
(202) 564-7061

---

**From:** Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>  
**Sent:** Tuesday, November 2, 2021 5:13 PM  
**To:** Griffo, Shannon <[Griffo.Shannon@epa.gov](mailto:Griffo.Shannon@epa.gov)>  
**Cc:** Clarke, Victoria <[clarke.victoria@epa.gov](mailto:clarke.victoria@epa.gov)>; Fugh, Justina <[Fugh.Justina@epa.gov](mailto:Fugh.Justina@epa.gov)>  
**Subject:** Time Sensitive: Ethics Check for T Carbonell and A Nunez

Shannon, in OAR we have initiated a series of roundtable discussions with a set of 13-14 NGOs, including EDF and Sierra Club. The agenda will differ meeting to meeting (which I will monitor for any additional recusal issues – for tomorrow's agenda there are no flags) but the participants list is not expected to vary greatly. Each organization plans to send a single representative. Our first meeting is scheduled tomorrow and the participants list is attached. Given the diversity of participant organizations and the number of participants, I believe Tomas and Ale would be permitted to participate. Do you agree?

Ann (Campbell) Ferrio  
Chief of Staff  
EPA/Office of Air and Radiation  
Office: 202 566 1370

## Message

**From:** Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]  
**Sent:** 11/2/2021 4:12:36 PM  
**To:** Goffman, Joseph [Goffman.Joseph@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]; Nunez, Alejandra [Nunez.Alejandra@epa.gov]  
**CC:** Marks, Matthew [Marks.Matthew@epa.gov]  
**Subject:** FW: EJ Legal Tools Draft for AA review, etc  
**Attachments:** DRAFT EJ Legal Tools for AA Review 11.1.21.docx; Redline version of 2011 EJ Legal Tools with 2021 updates.pdf

Hello Joe, Tomas and Ale- Just wanted to reach out and say if there's anything you'd like to discuss or hear more about in the course of your review, we would be happy to meet or otherwise provide more info. Much of what is in the draft relates to OAQPS's work. We gave Mike K and others a preview yesterday, and there has already been a fair amount of coordination at a staff level. So hopefully there is nothing here that will surprise you all.

++++  
 he/him/his  
 (202) 695-6287 (c)

---

**From:** Serassio, Helen <Serassio.Helen@epa.gov>  
**Sent:** Tuesday, November 2, 2021 10:49 AM  
**To:** Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>  
**Cc:** Goldman, Lisa <Goldman.Lisa@epa.gov>  
**Subject:** FW: EJ Legal Tools Draft for AA review, etc

Hi Gautam,

Here's the message and the documents Marianne sent to the AAs last night.

Best,

Helen

---

**From:** Engelman-Lado, Marianne <EngelmanLado.Marianne@epa.gov>  
**Sent:** Monday, November 1, 2021 7:02 PM  
**To:** Hitchens, Lynnann <hitchens.lynnann@epa.gov>; Helm, Arron <Helm.Arron@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Shaw, Betsy <Shaw.Betsy@epa.gov>; Waterhouse, Carlton <Waterhouse.Carlton@epa.gov>; Breen, Barry <Breen.Barry@epa.gov>; Freedhoff, Michal <Freedhoff.Michal@epa.gov>; Keigwin, Richard <Keigwin.Richard@epa.gov>; Fox, Radhika <Fox.Radhika@epa.gov>; Arroyo, Victoria <Arroyo.Victoria@epa.gov>; Fine, Philip <Fine.Philip@epa.gov>; Starfield, Lawrence <Starfield.Lawrence@epa.gov>; Nishida, Jane <Nishida.Jane@epa.gov>; Cherry, Katrina <Cherry.Katrina@epa.gov>; Nunez, Alejandra <Nunez.Alejandra@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>  
**Cc:** Serassio, Helen <Serassio.Helen@epa.gov>  
**Subject:** EJ Legal Tools Draft for AA review, etc

Deliberative

Dear Colleagues,

Please see attached for your review a deliberative draft of *EPA Legal Tools to Advance Environmental Justice*. The document updates *EJ Legal Tools*, released in 2011 and 2014, which identified EPA legal authorities providing opportunities to advance environmental justice. We are requesting your review by Monday, November 15<sup>th</sup>.

# Ex. 5 Attorney Client (AC)

While we appreciate that we're suggesting an ambitious timeframe, we are largely looking for you to identify any missed opportunities or "red flag" issues. Please note that the document is in draft form and that we will resolve formatting and editorial issues before we finalize the document. All along, we've said that our goal isn't just to produce a document but to make sure we develop a deliverable in a short timeframe that EPA can and will use as a resource as we advance the Administration's policy to achieve equity and environmental justice. Toward that end, our goal is to have a document ready for at least initial internal use before the end of the calendar year.

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While the draft focuses on EPA's opportunities to advance environmental justice, it does not prescribe when and how the Agency should undertake specific actions. Indeed, we understand that there are resource constraints and other factors that affect the feasibility of any given action at any particular time. Nonetheless, we know it is critical to set forth where we have authority to take action. Note also that we see *Legal Tools* as a living document that we plan to update periodically to reflect emerging policy, experience, and changes in our authorities.

Upon completion of your review, please send one draft to me with a copy to Helen Serassio.

Thanks,

Marianne

Marianne Engelman-Lado  
Deputy General Counsel for Environmental Initiatives  
Office of General Counsel  
EPA  
202 480-5842 (cell)

## Message

**From:** Campbell, Ann [Campbell.Ann@epa.gov]  
**Sent:** 11/17/2021 10:37:06 PM  
**To:** Goffman, Joseph [Goffman.Joseph@epa.gov]  
**Subject:** FW: Briefing Paper for Friday ACE Litigation Briefing  
**Attachments:** ACE-CPP Repeal SCOTUS case\_Admin. briefing 11.17.21.pptx

Did you know this was going to be scheduled?

Ann (Campbell) Ferrio  
 Chief of Staff  
 EPA/Office of Air and Radiation  
 Office: 202 566 1370

---

**From:** Hogan, Stephanie <Hogan.Stephanie@epa.gov>  
**Sent:** Wednesday, November 17, 2021 5:32 PM  
**To:** Lance, Kathleen <Lance.Kathleen@epa.gov>; Morgan, Ashley <Morgan.Ashley.M@epa.gov>; scheduling <scheduling@epa.gov>  
**Cc:** Kim, Eunjung <Kim.Eun@epa.gov>; Hooper, Daniel <hooper.daniel@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Hoffman, Howard <hoffman.howard@epa.gov>  
**Subject:** Briefing Paper for Friday ACE Litigation Briefing

Kathleen, Ashley, & Ann –

I'm attaching a set of briefing slides for a briefing we understand will likely be scheduled on Friday regarding the ACE litigation. This is a follow up meeting to last Friday's briefing on the same subject (per the emails below). Apologies these are arriving late, but our General Counsel had some late comments we wanted to incorporate.

Please let us know if you need anything further.

Best,  
 Stephanie

Stephanie L. Hogan | Assistant General Counsel for the NSPS and Visibility Protection Practice Group | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

Pronouns: she/her/hers

CONFIDENTIAL communication for internal deliberations only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.

---

**From:** Hoffman, Howard <hoffman.howard@epa.gov>  
**Sent:** Wednesday, November 10, 2021 3:31 PM  
**To:** Lance, Kathleen <Lance.Kathleen@epa.gov>; Morgan, Ashley <Morgan.Ashley.M@epa.gov>; scheduling <scheduling@epa.gov>  
**Cc:** Kim, Eunjung <Kim.Eun@epa.gov>; Hooper, Daniel <hooper.daniel@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Hogan, Stephanie <Hogan.Stephanie@epa.gov>  
**Subject:** RE: Dan or Ann -- we have to send a briefing paper to AO for an Administrator briefing on Friday -- to whom should we send the paper? Thx.

Kathleen, Ashley – I'm in OGC. We are leading a briefing for the Administrator concerning the Supreme Court case on the ACE Rule that we understand will be scheduled for this Friday, Nov. 12. We have a draft of a briefing paper that is now being reviewed by folks at the political level. We expect to send it to you by 4:00 pm or shortly thereafter. Is that OK? Thanks.

---

**From:** Kim, Eunjung <[Kim.Eun@epa.gov](mailto:Kim.Eun@epa.gov)>

**Sent:** Wednesday, November 10, 2021 3:27 PM

**To:** Hooper, Daniel <[hooper.daniel@epa.gov](mailto:hooper.daniel@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>

**Subject:** RE: Dan or Ann -- we have to send a briefing paper to AO for an Administrator briefing on Friday -- to whom should we send the paper? Thx.

Hello Howard,

If this is for an OGC briefing, I would recommend directly sending it to the AO. Please send the materials to [Lance.Kathleen@epa.gov](mailto:Lance.Kathleen@epa.gov), [Morgan.Ashley.M@epa.gov](mailto:Morgan.Ashley.M@epa.gov), [scheduling@epa.gov](mailto:scheduling@epa.gov). Also based on my experience with AO deadlines, I think you might need to get the materials to them ASAP since they are usually due at 3PM ET.

Please let me know if you have any further questions.

Thanks!

Eunjung Kim  
Special Assistant  
Office of Air and Radiation  
Environmental Protection Agency  
(202) 815-7252

---

**From:** Hooper, Daniel <[hooper.daniel@epa.gov](mailto:hooper.daniel@epa.gov)>

**Sent:** Wednesday, November 10, 2021 3:21 PM

**To:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>

**Cc:** Kim, Eunjung <[Kim.Eun@epa.gov](mailto:Kim.Eun@epa.gov)>

**Subject:** RE: Dan or Ann -- we have to send a briefing paper to AO for an Administrator briefing on Friday -- to whom should we send the paper? Thx.

Hi Howard,

Assuming it falls into OAR's portfolio, please send it to Ann, myself, and Eunjung Kim (cc'd on this email). We will ensure it gets to the AO

Thanks

Dan

Daniel Hooper  
Assistant Chief of Staff  
Office of Air and Radiation, US EPA  
[hooper.daniel@epa.gov](mailto:hooper.daniel@epa.gov)  
202.343.9167 office

*Pronouns: He/Him/His*

---

**From:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>

**Sent:** Wednesday, November 10, 2021 3:03 PM

**To:** Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>; Hooper, Daniel <[hooper.daniel@epa.gov](mailto:hooper.daniel@epa.gov)>

**Subject:** Dan or Ann -- we have to send a briefing paper to AO for an Administrator briefing on Friday -- to whom should we send the paper? Thx.

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) (240)-401-9721(C) Room 7415 WJC-North  
Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

## Message

**From:** Payne, James (Jim) [payne.james@epa.gov]  
**Sent:** 11/24/2021 10:57:18 PM  
**To:** McCabe, Janet [McCabe.Janet@epa.gov]; Goffman, Joseph [Goffman.Joseph@epa.gov]; Arroyo, Victoria [Arroyo.Victoria@epa.gov]  
**CC:** Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Marks, Matthew [Marks.Matthew@epa.gov]  
**Subject:** Fwd: Letter to Todd Kim from Jeffrey Prieto re: EPA's Recommendation for the Merits Briefing in West Virginia v. EPA, No. 20-1530 (S. Ct.)  
**Attachments:** Letter to Todd Kim from Jeffrey Prieto re EPA Recommendation for Briefing in West VA v EPA No. 20-1530 (S Ct -- Amn Lung Assn - ACE Rule) Nov 24 2021.pdf

Ensuring you have this, and with many thanks for your input which was used to clarify and improve the framing. Happy Thanksgiving everyone!

Sent from my iPhone

Begin forwarded message:

**From:** "Hoffman, Howard" <hoffman.howard@epa.gov>  
**Date:** November 24, 2021 at 4:06:49 PM EST  
**To:** "Lipshultz, Jon (ENRD)" <Jon.Lipshultz@usdoj.gov>, "Hostetler, Eric (ENRD)" <Eric.Hostetler@usdoj.gov>, Meghan Greenfield <Meghan.Greenfield@usdoj.gov>, Chloe.Kolman@usdoj.gov  
**Cc:** "Prieto, Jeffrey" <Prieto.Jeffrey@epa.gov>, "Payne, James (Jim)" <payne.james@epa.gov>, "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>, "Marks, Matthew" <Marks.Matthew@epa.gov>, "Hogan, Stephanie" <Hogan.Stephanie@epa.gov>, "Vijayan, Abi" <Vijayan.Abi@epa.gov>, "Jordan, Scott" <Jordan.Scott@epa.gov>, "Schramm, Daniel" <Schramm.Daniel@epa.gov>, "Greenglass, Nora" <Greenglass.Nora@epa.gov>, "Garfinkle, Stacey" <garfinkle.stacey@epa.gov>, "Conrad, Daniel" <conrad.daniel@epa.gov>  
**Subject:** Letter to Todd Kim from Jeffrey Prieto re: EPA's Recommendation for the Merits Briefing in West Virginia v. EPA, No. 20-1530 (S. Ct.)

Attached is EPA's letter with our recommendation in this case. Happy Thanksgiving to all.

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) (240)-401-9721(C) Room 7415 WJC-North  
Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

## Message

**From:** Culligan, Kevin [Culligan.Kevin@epa.gov]  
**Sent:** 1/3/2022 11:02:55 PM  
**To:** Goffman, Joseph [Goffman.Joseph@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]  
**CC:** Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]  
**Subject:** FW: For Review: Draft ACE Brief  
**Attachments:** W Va 010322.2\_circ.docx

My understanding is that you should have a version of this to comment on? We are creating a consolidated set of OAR staff comments. Will let you know if we identify anything major.

---

**From:** Hogan, Stephanie <Hogan.Stephanie@epa.gov>  
**Sent:** Monday, January 03, 2022 5:07 PM  
**To:** Culligan, Kevin <Culligan.Kevin@epa.gov>; Stenhouse, Jeb <Stenhouse.Jeb@epa.gov>  
**Cc:** Hoffman, Howard <hoffman.howard@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Adamantiades, Mikhail <Adamantiades.Mikhail@epa.gov>; Birnbaum, Rona <Birnbaum.Rona@epa.gov>  
**Subject:** For Review: Draft ACE Brief

Kevin, et al.,

Sharing the draft ACE brief we just got from OSG this afternoon. We're presently reviewing in ARLO and we've been asked to return any EPA comments to DOJ by Wednesday afternoon. Accordingly, please let us know if you have any comments or concerns by 2pm Wednesday. If you want to share with anyone else in your offices, please do so, and we'd appreciate if we could get consolidated comments from your offices to ease our efforts to fold them in with our own.

Note that we have also decided to share this draft with political management. Although we originally planned to share the next draft with senior leadership, we learned that we may not receive that until a few days before the Jan. 18 filing deadline. In order to ensure that all reviewers have an opportunity to inform the final brief, we decided to share this earlier draft with everyone.

Please let us know if you have any questions.

Best,  
Stephanie

Stephanie L. Hogan | Assistant General Counsel for the NSPS and Visibility Protection Practice Group | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

Pronouns: she/her/hers

CONFIDENTIAL communication for internal deliberations only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.

---

**From:** Culligan, Kevin <Culligan.Kevin@epa.gov>  
**Sent:** Thursday, December 23, 2021 11:24 AM  
**To:** Stenhouse, Jeb <Stenhouse.Jeb@epa.gov>  
**Cc:** Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Hoffman, Howard <hoffman.howard@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Adamantiades, Mikhail <Adamantiades.Mikhail@epa.gov>; Birnbaum, Rona <Birnbaum.Rona@epa.gov>  
**Subject:** Re: Quick turnaround requests on ACE litigation

Thanks for the update. Still around if there are questions

Sent from my iPhone

On Dec 23, 2021, at 11:02 AM, Stenhouse, Jeb <[Stenhouse.Jeb@epa.gov](mailto:Stenhouse.Jeb@epa.gov)> wrote:

Thanks Stephanie!

---

**From:** Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>

**Sent:** Thursday, December 23, 2021 11:01 AM

**To:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>

**Cc:** Stenhouse, Jeb <[Stenhouse.Jeb@epa.gov](mailto:Stenhouse.Jeb@epa.gov)>; Vijayan, Abi <[Vijayan.Abi@epa.gov](mailto:Vijayan.Abi@epa.gov)>

**Subject:** Re: Quick turnaround requests on ACE litigation

Jeb & Kevin -

We have an update on the timing of the brief. We're now expecting the next draft of the brief the first week of January. Exact dates are TBD, but we know OSG is not planning to send a draft next week. I wanted to let you know in case you were planning around that over this holiday period.

We are still expecting two OSG drafts in January before the filing deadline on the 18th, so we'll keep the same structure of having career review of the first and political review of the second. We can let you know when we have more certainty about what dates we might see those drafts in January.

Stephanie

Sent from my iPhone

On Dec 20, 2021, at 12:29 PM, Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)> wrote:

Thanks, Kevin. I'm cc'ing Abi for her awareness since she will be acting for me while I'm on leave starting Wednesday. But like you, I will also be checking in at least once a day.

For Jeb's benefit: as we just got discussed, we're expecting our first draft of the brief from OSG next week and can share that with you for review at the career level, and we'll let you know if we have any specific asks of your offices in that period. We're then expecting another draft from OSG sometime in the first two weeks of January – we're planning to share that draft with Jeff Prieto and Joe Goffman for political-level review.

Stephanie L. Hogan | Assistant General Counsel for the NSPS and Visibility Protection Practice Group | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

Pronouns: she/her/hers

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**From:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>

**Sent:** Monday, December 20, 2021 11:16 AM

**To:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>; Marks, Matthew

<Marks.Matthew@epa.gov>

**Cc:** Stenhouse, Jeb <Stenhouse.Jeb@epa.gov>

**Subject:** Quick turnaround requests on ACE litigation

Over the holidays, if you need something on the ACE litigation, I would start with Jeb and I. While I am taking off after Wednesday, I will make sure I check e-mail at least once a day. Jeb is in and is acting OD for CAMD, so between the two of us, we should be able to respond and/or figure out if there is anyone else in the air office who can help.

## Message

**From:** Hoffman, Howard [hoffman.howard@epa.gov]  
**Sent:** 1/17/2022 6:32:11 PM  
**To:** Goffman, Joseph [Goffman.Joseph@epa.gov]; Marks, Matthew [Marks.Matthew@epa.gov]; Culligan, Kevin [Culligan.Kevin@epa.gov]  
**CC:** Kevin Culligan [scoopgoblue@gmail.com]; Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]  
**Subject:** RE: Continue to have significant concerns about new language on page 43  
**Attachments:** W Va 0116221.4\_circ\_OGC-ARLO.docx

Here's the current draft with our suggestions. Note that we've attached this comment bubble to the discussion on p. 43:

We suggest:

## Ex. 5 Attorney Work Product (AWP)

**From:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Sent:** Monday, January 17, 2022 1:29 PM  
**To:** Marks, Matthew <Marks.Matthew@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Hoffman, Howard <hoffman.howard@epa.gov>  
**Cc:** Kevin Culligan <scoopgoblue@gmail.com>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>  
**Subject:** RE: Continue to have significant concerns about new language on page 43  
**Importance:** High

## Ex. 5 Attorney Client (AC)

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

---

**From:** Marks, Matthew <Marks.Matthew@epa.gov>  
**Sent:** Monday, January 17, 2022 1:06 PM  
**To:** Culligan, Kevin <Culligan.Kevin@epa.gov>; Hoffman, Howard <hoffman.howard@epa.gov>  
**Cc:** Kevin Culligan <scoopgoblue@gmail.com>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>  
**Subject:** RE: Continue to have significant concerns about new language on page 43

## Ex. 5 Attorney Client (AC)

---

**Matthew C. Marks**  
Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
M: 202-603-6170  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

---

**From:** Culligan, Kevin <Culligan.Kevin@epa.gov>  
**Sent:** Monday, January 17, 2022 12:59 PM  
**To:** Hoffman, Howard <hoffman.howard@epa.gov>  
**Cc:** Kevin Culligan <scoopgoblue@gmail.com>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>  
**Subject:** Continue to have significant concerns about new language on page 43

## Ex. 5 Attorney Client (AC)

Sent from my iPhone

On Jan 16, 2022, at 6:48 PM, Hoffman, Howard <hoffman.howard@epa.gov> wrote:

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**From:** Hoffman, Howard  
**Sent:** Sunday, January 16, 2022 6:47 PM  
**To:** Kevin Culligan Ex. 6 Personal Privacy (PP)

**Cc:** Culligan, Kevin <Culligan.Kevin@epa.gov>

**Subject:** Kevin, could you look at something right away?

These are questions from the Solicitor General. Would like to get back to her within the hour, if we can.

# Ex. 5 Attorney Client (AC)

Sending to home e-mail b/c of technical difficulties with work computer.

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) (240)-401-9721(C) Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

## Message

**From:** Marks, Matthew [Marks.Matthew@epa.gov]  
**Sent:** 1/18/2022 1:15:21 PM  
**To:** Goffman, Joseph [Goffman.Joseph@epa.gov]  
**CC:** Hoffman, Howard [hoffman.howard@epa.gov]; Culligan, Kevin [Culligan.Kevin@epa.gov]; Kevin Culligan [scoopgoblue@gmail.com]; Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Hogan, Stephanie [Hogan.Stephanie@epa.gov]  
**Subject:** RE: Continue to have significant concerns about new language on page 43

## Ex. 5 Attorney Work Product (AWP)

**Matthew C. Marks**

Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
M: 202-603-6170  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

---

**From:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Sent:** Tuesday, January 18, 2022 8:11 AM  
**To:** Marks, Matthew <Marks.Matthew@epa.gov>  
**Cc:** Hoffman, Howard <hoffman.howard@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Kevin Culligan <scoopgoblue@gmail.com>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Hogan, Stephanie <Hogan.Stephanie@epa.gov>  
**Subject:** Re: Continue to have significant concerns about new language on page 43

Note that I forwarded the meeting invitation to Kevin and Peter.

## Ex. 5 Attorney Client (AC)

Sent from my iPhone

On Jan 18, 2022, at 8:04 AM, Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)> wrote:

Adding Stephanie (sorry, did not realize you weren't on this thread).

**Matthew C. Marks**

Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel

U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
M: 202-603-6170  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

---

**From:** Marks, Matthew  
**Sent:** Tuesday, January 18, 2022 8:02 AM  
**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Cc:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Kevin Culligan <[scoopgoblue@gmail.com](mailto:scoopgoblue@gmail.com)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Subject:** RE: Continue to have significant concerns about new language on page 43

## Ex. 5 Attorney Client (AC)

I will forward the meeting invite.

---

**Matthew C. Marks**  
Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
M: 202-603-6170  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

---

**From:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Sent:** Tuesday, January 18, 2022 7:52 AM  
**To:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Cc:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Kevin Culligan <[scoopgoblue@gmail.com](mailto:scoopgoblue@gmail.com)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Subject:** RE: Continue to have significant concerns about new language on page 43  
**Importance:** High

## Ex. 5 Attorney Client (AC)

If you think it would help, I am available to participate in a call.

Thanks.

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

---

**From:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Sent:** Tuesday, January 18, 2022 7:32 AM  
**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Cc:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Kevin Culligan <[scoopgoblue@gmail.com](mailto:scoopgoblue@gmail.com)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Subject:** RE: Continue to have significant concerns about new language on page 43

Hi folks,

# Ex. 5 Attorney Work Product (AWP)

Matt

---

**Matthew C. Marks**  
Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
M: 202-603-6170  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

---

**From:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Sent:** Monday, January 17, 2022 9:34 PM  
**To:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Cc:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Kevin Culligan <[scoopgoblue@gmail.com](mailto:scoopgoblue@gmail.com)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Subject:** Re: Continue to have significant concerns about new language on page 43

Thank you, Matt and All.

Sent from my iPhone

On Jan 17, 2022, at 9:32 PM, Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)> wrote:

We're going to meet with OSG tomorrow at 8:30am to get this worked out. Whatever language we come up with, we will circulate it with OAR.

---

**Matthew C. Marks**  
Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

On Jan 17, 2022, at 8:31 PM, Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)> wrote:

Ugh. Thanks.

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

---

**From:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Sent:** Monday, January 17, 2022 8:30 PM  
**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Cc:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Kevin Culligan <[scoopgoblue@gmail.com](mailto:scoopgoblue@gmail.com)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Subject:** Re: Continue to have significant concerns about new language on page 43

## Ex. 5 Attorney Work Product (AWP)

---

**Matthew C. Marks**  
Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

On Jan 17, 2022, at 8:05 PM, Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)> wrote:

Any news to report? Thanks.

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

---

**From:** Goffman, Joseph  
**Sent:** Monday, January 17, 2022 2:14 PM  
**To:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Cc:** Kevin Culligan <[scoopgoblue@gmail.com](mailto:scoopgoblue@gmail.com)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Subject:** RE: Continue to have significant concerns about new language on page 43

Thanks, Matt. Please do keep us posted.

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

---

**From:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Sent:** Monday, January 17, 2022 2:01 PM  
**To:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>; Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Cc:** Kevin Culligan <[scoopgoblue@gmail.com](mailto:scoopgoblue@gmail.com)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>  
**Subject:** RE: Continue to have significant concerns about new language on page 43

# Ex. 5 Attorney Client (AC)

---

**Matthew C. Marks**  
Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
M: 202-603-6170  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

---

**From:** Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>  
**Sent:** Monday, January 17, 2022 1:32 PM

**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>

**Cc:** Kevin Culligan <scoopgoblue@gmail.com>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>

**Subject:** RE: Continue to have significant concerns about new language on page 43

Here's the current draft with our suggestions. Note that we've attached this comment bubble to the discussion on p. 43:

We suggest:

- Some word-shaving edits.
- Deleting the reference to employees (any closure of a plant or reduced use of coal could result in what appear to be a large number of folks losing their jobs)
- Adding a reference to electricity prices
- Adding a J.A. cite to the CPP – this cite implies that this discussion is grounded in the record of the CPP, so that at least, at the time of the CPP, it was clear that a rule premised on widespread closure would have violated the constraints.

**Important Comment:** Most broadly, be aware that because a large percentage of existing coal-fired power plants are marginally profitable and already are expected to retire in the foreseeable future due to market forces, any rule that the Biden Administration does could very well contribute to the early closure of a large percentage of the existing coal-fired power plants. While we would say that such a rule is not “premised on” widespread closures, the line between “premised on” and the impact of the rule could be thin. We have not been able to come up with wording suggestions to account for this concern, but we want to point it out. Two possible solutions are softening the language so that it is less definitive and adding a FN that again reminds the court of the distinction between systems that have the intent of closing plants versus systems that merely have that effect. At bottom, we want to avoid a decision that says EPA cannot promulgate a rule if it would lead to plant closures, as even a rule based on modest heat rate improvements would likely lead to the closure of at least some plants, and a rule based on more stringent controls, like natural gas co-firing or CCS, could very well lead to widespread closures.

---

**From:** Goffman, Joseph <Goffman.Joseph@epa.gov>

**Sent:** Monday, January 17, 2022 1:29 PM

**To:** Marks, Matthew <Marks.Matthew@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Hoffman, Howard <hoffman.howard@epa.gov>

**Cc:** Kevin Culligan <scoopgoblue@gmail.com>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>

**Subject:** RE: Continue to have significant concerns about new language on page 43

**Importance:** High

Just tried calling you, Matt. Am on phone with Kevin, who just read me the sentence on page 43 linking closures, exorbitant expense, and “adequately demonstrated”. I believe that this presents an urgent problem. Can one of you please call me at [Ex. 6 Personal Privacy (PP)] as soon as you get a chance? Thanks.

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

---

**From:** Marks, Matthew <Marks.Matthew@epa.gov>

**Sent:** Monday, January 17, 2022 1:06 PM

**To:** Culligan, Kevin <Culligan.Kevin@epa.gov>; Hoffman, Howard <hoffman.howard@epa.gov>

**Cc:** Kevin Culligan <scoopgoblue@gmail.com>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Tsirigotis, Peter

<Tsirigotis.Peter@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>

**Subject:** RE: Continue to have significant concerns about new language on page 43

I just spoke with Howard. We all agree that we don't want to suggest that a rule cannot have the effect of leading to the closure of plants. The brief does not do that explicitly, as it currently throws shade on a BSER that is "premised on the closure of a wide swath of plants." That being said, by taking a definitive stance that plant closures would be exorbitantly costly, the brief suggests even a BSER that has the incidental effect of plant closures would be impermissible. We're going to point this out in a comment bubble and suggest some potential solutions for the SG to consider.

---

**Matthew C. Marks**

Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
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Washington, DC 20460  
T: 202-564-3276  
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E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

---

**From:** Culligan, Kevin <Culligan.Kevin@epa.gov>

**Sent:** Monday, January 17, 2022 12:59 PM

**To:** Hoffman, Howard <hoffman.howard@epa.gov>

**Cc:** Kevin Culligan <scoopgoblue@gmail.com>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>

**Subject:** Continue to have significant concerns about new language on page 43

Could not get ahold of either Joe or Peter, but language suggesting that we agree a large number of retirements is always exorbitantly costly has ramifications well beyond outside the fenceline.

Would strongly suggest it needs to be toned down with either an explicit caveat: "Absent rare circumstances like an aging source category already rapidly being replaced by less expensive technology...." Or just tone it down to not make it absolute without an explicit qualifier as to why.

Sent from my iPhone

On Jan 16, 2022, at 6:48 PM, Hoffman, Howard <hoffman.howard@epa.gov> wrote:

---

**From:** Hoffman, Howard

**Sent:** Sunday, January 16, 2022 6:47 PM

**To:** Kevin Culligan <scoopgoblue@gmail.com>

**Cc:** Culligan, Kevin <Culligan.Kevin@epa.gov>

**Subject:** Kevin, could you look at something right away?

These are questions from the Solicitor General. Would like to get back to her within the hour, if we can.

Please look at our (fairly short) answers to questions 2, 9, and 10 (look for “EPA Response” highlighted in yellow). Don’t edit them or anything—question is whether they are inaccurate or otherwise cause concern. We’re trying to be very general in the answers.

Feel free to call if you need, at [Ex. 6 Personal Privacy (PP)]

Sending to home e-mail b/c of technical difficulties with work computer.

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) [Ex. 6 Personal Privacy (PP)] Room 7415 WJC-North  
Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

The contents of this message may be subject to the attorney-client, work-product, or deliberative process privileges.

## Message

**From:** Mugdan, Walter [Mugdan.Walter@epa.gov]  
**Sent:** 1/18/2022 4:34:29 PM  
**To:** Goffman, Joseph [Goffman.Joseph@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]; Prieto, Jeffrey [Prieto.Jeffrey@epa.gov]; Hoffer, Melissa [Hoffer.Melissa@epa.gov]  
**CC:** Starfield, Lawrence [Starfield.Lawrence@epa.gov]; Cozad, David [Cozad.David@epa.gov]; Niebling, William [Niebling.William@epa.gov]; Katims, Casey [Katims.Casey@epa.gov]; Hamilton, Lindsay [Hamilton.Lindsay@epa.gov]; Conger, Nick [Conger.Nick@epa.gov]; Ruvo, Richard [Ruvo.Richard@epa.gov]; Simon, Paul [Simon.Paul@epa.gov]; LaPosta, Dore [LaPosta.Dore@epa.gov]; Guerrero, Carmen [guerrero.carmen@epa.gov]; Mears, Mary [Mears.Mary@epa.gov]; Kluesner, Dave [kluesner.dave@epa.gov]  
**Subject:** FW: Urgent: St. Croix Refinery/Wehrum Letter [Limetree Refinery]  
**Attachments:** CAA 20-02M Petition for Review.pdf; PAL Comment FINAL.pdf

**Importance:** High

Colleagues,

At Lisa Garcia's request I'm forwarding to you this message that she received this morning from Elizabeth Neville, who represents the St. Croix Environmental Association.

Walter

*Walter Mugdan  
 Deputy Regional Administrator  
 U.S. EPA Region 2  
 212-637-4390 (office)  
 646-369-0058 (mobile)*

---

**From:** Elizabeth Neville [mailto:elizabeth@neville.com]  
**Sent:** Tuesday, January 18, 2022 8:38 AM  
**To:** Garcia, Lisa <Garcia.Lisa@epa.gov>  
**Cc:** Mugdan, Walter <Mugdan.Walter@epa.gov>; Kluesner, Dave <kluesner.dave@epa.gov>; Bain, Zeno <Bain.Zeno@epa.gov>; Tejada, Matthew <Tejada.Matthew@epa.gov>; Benjamin, Arielle <Benjamin.Arielle@epa.gov>; Bain, Zeno <Bain.Zeno@epa.gov>; Jennifer Valiulis <jennifer.valiulis@gmail.com>; Heather Croshaw <heather.croshaw@gmail.com>; cobrally@gmail.com; Kai A. Nielsen <340vics@gmail.com>; John Walker <jwalke@nrdc.org>; Davis, Emily <edavis@nrdc.org>; jwilliams@stxfoundation.org; jteelsimmonds@biologicaldiversity.org; Miyoko Sakashita <miyoko@biologicaldiversity.org>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>; fgerard@chantvi.org; William.weeks@uvi.edu; Sara Zuckerman <stxsara@gmail.com>; dcapjane@aol.com  
**Subject:** Urgent: St. Croix Refinery/Wehrum Letter  
**Importance:** High

Dear Administrator Garcia,

I hope that the first weeks of 2022 have been treating you well and that you had a peaceful, enjoyable holiday season. On behalf of St. Croix Environmental Association, allied organizations, and St. Croix community members, I want to thank you for your and your EPA Region 2 colleagues' time in meeting with us in December. We appreciate the opportunity to voice our concerns about the environmental justice and community health issues with the oil refinery on-island; as we shared, several of the issues caused by Limetree Bay's botched restart in 2021 are not yet resolved, and we are hopeful that EPA Region 2 will ensure that the ultimate purchaser of the facility both complies with applicable law going forward and that Limetree and the purchaser are held accountable for the harm caused by the facility to date.

I wanted to follow up on an item that we discussed during our meeting: specifically, our urgent request that EPA remove from its website and affirmatively revoke in writing the April 5, 2018 letter to Limetree's attorneys by former Assistant Administrator Wehrum([https://www.epa.gov/sites/default/files/2018-04/documents/limetree\\_2018.pdf](https://www.epa.gov/sites/default/files/2018-04/documents/limetree_2018.pdf)) ("Wehrum Letter"), which is still posted here: <https://www.epa.gov/nsr/reactivation-shutdown-source> - actively listed as a policy/guidance document on the Reactivation Policy. As we discussed on our call and was discussed at length in SEA and allies' public comments on the PAL permit and subsequent Petition for Review (both attached for convenience), the Wehrum Letter ignores several pertinent factors and serves as a grave misapplication of the Reactivation Policy — a policy which, as you may recall, EPA under the Trump Administration arbitrarily revoked in its response to our PAL comments. Critically, the Wehrum Letter's erroneous conclusion that the refinery is not a "new source" for the purpose of PSD requirements is not only a misstatement of law, it created the foundation for a rushed restart and resultant extreme pollution that caused widespread sickness and multiple deaths on St. Croix. To allow the Wehrum Letter to remain on display as an active policy/guidance document is contrary to Environmental Justice principles and alarmingly, could be relied upon by the ultimate bankruptcy purchaser of the refinery to attempt to circumvent PSD permitting and the requisite, critically needed installation of Best Available Control Technology. Considering that both leading prospective refinery purchasers have expressed intentions that are concerning from an Environmental Justice perspective, this is a matter of extreme urgency: West Indies Petroleum, the current lead, has stated in recent media that it seeks to double the facility's refining capacity; and St. Croix Energy, the runner-up, has stated that it will endeavor to restart the refinery under Limetree's permits and with key Limetree personnel. **We thus urgently request that EPA remove the Wehrum Letter from its website and affirmatively memorialize its revocation in writing.** This would be consistent with the Biden Administration's declarations on Environmental Justice and corresponding revocation of problematic Trump Administration actions that are inconsistent with Environmental Justice principles; this is one such action that should accordingly also be revoked.

Thank you for your consideration. Please do not hesitate to reach out if you have any questions. I look forward to hearing from you.

Kind regards,  
Elizabeth Neville

Elizabeth Leigh Neville  
Attorney at Law  
The Neville Law Firm, LLC  
(407) 765-2800  
[Elizabeth@Neville.com](mailto:Elizabeth@Neville.com)

## Message

**From:** Hogan, Stephanie [Hogan.Stephanie@epa.gov]  
**Sent:** 1/19/2022 1:58:03 PM  
**To:** Marks, Matthew [Marks.Matthew@epa.gov]; Goffman, Joseph [Goffman.Joseph@epa.gov]; Prieto, Jeffrey [Prieto.Jeffrey@epa.gov]; Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Culligan, Kevin [Culligan.Kevin@epa.gov]; Payne, James (Jim) [payne.james@epa.gov]; Arroyo, Victoria [Arroyo.Victoria@epa.gov]  
**CC:** Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Hoffman, Howard [hoffman.howard@epa.gov]  
**Subject:** RE: ACE Brief Language  
**Attachments:** 20220118190138353\_20-1530 Br for State and Municipal Respondents.pdf; 20220118211953209\_20-1530bsUnitedStates.pdf; 20220118135708752\_Power Company Respondents Merits Brief.pdf; 20220118133930812\_20-1530 Brief for NGO Respondents.pdf

Folks,

Most of you should have received EPA's as-filed brief in an email last night, but I have attached it here again along with the briefs of our NGO, State, and industry allies. Over the next 10 days we expect to see briefs filed by amici in our support, as well as the reply briefs from petitioners, followed by oral argument scheduled on Feb. 28. We will be certain to share information about how to listen to the oral argument, which will stream live online.

I'll echo Matt's thanks for everyone's help over the last few days in particular.

Best,  
 Stephanie

Stephanie L. Hogan | Assistant General Counsel for the NSPS and Visibility Protection Practice Group | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

Pronouns: she/her/hers

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---

**From:** Marks, Matthew <Marks.Matthew@epa.gov>  
**Sent:** Tuesday, January 18, 2022 11:35 AM  
**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>; Prieto, Jeffrey <Prieto.Jeffrey@epa.gov>; Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Tsirigotis, Peter <Tsirigotis.Peter@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Payne, James (Jim) <payne.james@epa.gov>  
**Cc:** Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Hoffman, Howard <hoffman.howard@epa.gov>  
**Subject:** RE: ACE Brief Language

Thank you all. This has been a tremendous effort on everyone's part. We'll forward the as-filed brief later this evening, along with those of our allies.

---

**Matthew C. Marks**

Deputy Associate General Counsel  
 Air and Radiation Law Office  
 Office of General Counsel  
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---

**From:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Sent:** Tuesday, January 18, 2022 11:27 AM  
**To:** Prieto, Jeffrey <[Prieto.Jeffrey@epa.gov](mailto:Prieto.Jeffrey@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>  
**Subject:** RE: ACE Brief Language

Good here. Echoing Jeff, Kevin, Peter, and I really appreciate your all's going the extra miles on resolving this.

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

---

**From:** Prieto, Jeffrey <[Prieto.Jeffrey@epa.gov](mailto:Prieto.Jeffrey@epa.gov)>  
**Sent:** Tuesday, January 18, 2022 11:24 AM  
**To:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>  
**Subject:** RE: ACE Brief Language

If Joe and OGC are fine with the language, we are good to go.

Best,

Jeff

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---

**From:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Sent:** Tuesday, January 18, 2022 11:22 AM  
**To:** Prieto, Jeffrey <[Prieto.Jeffrey@epa.gov](mailto:Prieto.Jeffrey@epa.gov)>; Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>  
**Subject:** RE: ACE Brief Language

Thanks Jeff. Does this mean we can tell OSG we are good to go?

---

**Matthew C. Marks**

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Air and Radiation Law Office  
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Washington, DC 20460  
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---

**From:** Prieto, Jeffrey <[Prieto.Jeffrey@epa.gov](mailto:Prieto.Jeffrey@epa.gov)>

**Sent:** Tuesday, January 18, 2022 11:21 AM

**To:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>

**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>

**Subject:** RE: ACE Brief Language

All,

I just chatted with Joe. I don't think there is a need for a meeting. I will alert the appropriate folks of the concern.

Always happy to jump on a call if needed. I appreciate you all!

Jeff

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Washington, DC 20460  
T: 202-564-8040  
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---

**From:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>

**Sent:** Tuesday, January 18, 2022 10:28 AM

**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Prieto, Jeffrey <[Prieto.Jeffrey@epa.gov](mailto:Prieto.Jeffrey@epa.gov)>; Payne, James (Jim) <[payne.james@epa.gov](mailto:payne.james@epa.gov)>

**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>

**Subject:** RE: ACE Brief Language

Jeff, you've seen prior iterations of this language, but let us know if a short conversation would assist. We understand the political ramifications and want everyone to be comfortable with precisely where we land.

---

**Matthew C. Marks**

Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
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T: 202-564-3276  
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---

**From:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Sent:** Tuesday, January 18, 2022 10:19 AM  
**To:** Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Prieto, Jeffrey <[Prieto.Jeffrey@epa.gov](mailto:Prieto.Jeffrey@epa.gov)>; Payne, JamesJ <[payne.jamesj@epa.gov](mailto:payne.jamesj@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>  
**Subject:** RE: ACE Brief Language  
**Importance:** High

## Ex. 5 Attorney Client (AC)

Thanks.

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

---

**From:** Hogan, Stephanie <[Hogan.Stephanie@epa.gov](mailto:Hogan.Stephanie@epa.gov)>  
**Sent:** Tuesday, January 18, 2022 10:05 AM  
**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>; Tsirigotis, Peter <[Tsirigotis.Peter@epa.gov](mailto:Tsirigotis.Peter@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Hoffman, Howard <[hoffman.howard@epa.gov](mailto:hoffman.howard@epa.gov)>  
**Subject:** ACE Brief Language  
**Importance:** High

Folks,

## Ex. 5 Attorney Work Product (AWP)

# Ex. 5 Attorney Work Product (AWP)

Stephanie L. Hogan | Assistant General Counsel for the NSPS and Visibility Protection Practice Group | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

Pronouns: she/her/hers

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Nos. 20-1530, 20-1531, 20-1778, and 20-1780

---

IN THE  
**Supreme Court of the United States**

---

State of WEST VIRGINIA, et al.,  
*Petitioners,*  
v.  
ENVIRONMENTAL PROTECTION AGENCY, et al.,  
*Respondents.*  
THE NORTH AMERICAN COAL CORPORATION,  
*Petitioner,*  
v.  
ENVIRONMENTAL PROTECTION AGENCY, et al.,  
*Respondents.*  
WESTMORELAND MINING HOLDINGS LLC,  
*Petitioner,*  
v.  
ENVIRONMENTAL PROTECTION AGENCY, et al.,  
*Respondents.*  
State of NORTH DAKOTA,  
*Petitioner,*  
v.  
ENVIRONMENTAL PROTECTION AGENCY, et al.,  
*Respondents.*

---

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**BRIEF FOR STATE OF NEW YORK AND  
OTHER STATE AND MUNICIPAL RESPONDENTS**

---

	LETITIA JAMES <i>Attorney General</i> <i>State of New York</i>
	BARBARA D. UNDERWOOD* <i>Solicitor General</i>
MICHAEL J. MYERS <i>Senior Counsel</i>	STEVEN C. WU <i>Deputy Solicitor General</i>
ANDREW G. FRANK	MATTHEW W. GRIECO <i>Senior Assistant Solicitor General</i>
BRIAN M. LUSIGNAN <i>Assistant Attorneys General</i>	28 Liberty Street New York, New York 10005 (212) 416-8020 barbara.underwood@ag.ny.gov <i>*Counsel of Record</i>

---

*(Additional counsel listed on signature pages.)*

---

### QUESTION PRESENTED

Section 7411 of the Clean Air Act (42 U.S.C. § 7411) provides that the Environmental Protection Agency (EPA) shall select the “best system of emission reduction” that has been “adequately demonstrated” for categories of stationary sources such as power plants, after taking into account several enumerated criteria. With respect to existing sources, EPA then promulgates regulations—known as emission guidelines—reflecting “the degree of emission limitation achievable through the application of the best system of emission reduction,” and States use EPA’s guidelines to develop state plans with source-specific performance standards. The question presented is:

Whether EPA, in determining the “best system of emission reduction,” is forbidden from considering measures that the agency judged could not apply “to and at” an individual source standing alone—including measures that have been widely adopted and proven to significantly reduce emissions from sources.

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72 Fed. Reg. 46,161 (Aug. 17, 2007) .....	27
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Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) .....	7
Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019) .....	11
Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110 (Nov. 15, 2021) .....	35
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Environmental Protection Agency, <i>Illustrative ACE Scenario, State Emission Projections</i> (2019), <a href="https://www.epa.gov/sites/default/files/2019-06/illustrative_ace_scenario_0.zip">https://www.epa.gov/sites/default/files/2019- 06/illustrative_ace_scenario_0.zip</a> .....	13

<b>Administrative Sources</b>	<b>Page(s)</b>
<i>EPA Publications (cont'd)</i>	
Environmental Protection Agency, <i>Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019</i> (2021), <a href="https://www.epa.gov/sites/default/files/2021-04/documents/us-ghg-inventory-2021-main-text.pdf?VersionId=uua7i8WoMdB0c0M4ln8WVXMgn1GkujvD">https://www.epa.gov/sites/default/files/2021-04/documents/us-ghg-inventory-2021-main-text.pdf?VersionId=uua7i8WoMdB0c0M4ln8WVXMgn1GkujvD</a> .....	6
Environmental Protection Agency, <i>Regulatory Impact Analysis for the Clean Power Plan Final Rule</i> (Oct. 23, 2015), <a href="https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf">https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf</a> .....	11
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<b>Miscellaneous Authorities</b>	
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Miscellaneous Authorities	Page(s)
<i>Facing Risks, EPA’s Counsel Defends ‘Bold’ ACE Rule Legal Interpretation</i> , Inside EPA (Aug. 2, 2019), <a href="https://insideepa.com/daily-news/facing-risks-epa-s-counsel-defends-bold-ace-rule-legal-interpretation">https://insideepa.com/daily-news/facing-risks-epa-s-counsel-defends-bold-ace-rule-legal-interpretation</a> .....	11
H.R. 17255, 91st Cong. (1970) .....	22
<i>Merriam-Webster Dictionary</i> (online 2021) .....	21
National Assoc. of Clean Air Agencies, State Mercury Programs for Utilities (Dec. 4, 2007), <a href="https://www.4cleanair.org/wp-content/uploads/Documents/StateTable.pdf">https://www.4cleanair.org/wp-content/uploads/Documents/StateTable.pdf</a> .....	27
S. 4358, 91st Cong. (1970) .....	22
U.S. Global Change Research Program, <i>Fourth National Climate Assessment</i> (Rev. Mar. 2021), <a href="https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf">https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf</a> .....	6
<i>Webster’s Third New International Dictionary of the English Language Unabridged</i> (1968) .....	21

## INTRODUCTION

To reduce harmful pollution from stationary sources, Section 7411 of the Clean Air Act directs EPA to study all means of emission reduction that have been “adequately demonstrated” for categories of sources, such as power plants, and to draw on that expert analysis to determine the “best system of emission reduction” for such sources. 42 U.S.C. § 7411(a)(1). For existing sources, the best system informs EPA’s issuance of emission guidelines under which the States then establish performance standards for individual sources. *Id.* § 7411(d)(1).

This case concerns the scope of EPA’s authority to determine the best system for reducing carbon dioxide (CO<sub>2</sub>) emissions from existing power plants. Both the power sector and the States have long relied on a broad range of measures to cost-effectively reduce emissions of harmful pollutants, including CO<sub>2</sub>, from sources on the electric grid. But in the Affordable Clean Energy (ACE) Rule, EPA concluded that certain of those measures were categorically disqualified from consideration as part of the best system—no matter how effective or “adequately demonstrated” they were—solely because they involved the activities of more than one entity. The Rule’s insistence that the unambiguous meaning of “best system” in Section 7411(a)(1) was limited to “measures that can be applied to and at the level of the individual source” standing alone (J.A.1769) led it to disregard widely adopted and proven measures of reducing CO<sub>2</sub> emissions, such as cap-and-trade programs. And the Rule further concluded that this unambiguous meaning not only restrained EPA, but also barred States and sources from relying on such

measures to satisfy federal emission guidelines. (J.A.1893-1894.)

The court of appeals rejected the ACE Rule's limitations on both EPA authority and state flexibility, correctly finding that these limitations found no support in the text or structure of Section 7411. Contrary to petitioners' arguments, nothing in the decision below implicates this Court's cases on "major questions" or non-delegation. The lower court did not, as petitioners contend, give EPA untrammelled authority to regulate "any economic sector or almost any actor." (West Virginia (W.Va.) Br. 1.) Instead, it considered and rejected only the specific "to and at the source" limitation that the ACE Rule found to be unambiguously required by Section 7411.

Rather than focusing on the decision below or the ACE Rule's statutory interpretation, petitioners' arguments about agency overreach instead criticize an earlier rule, the Clean Power Plan, that EPA has said it no longer intends to enforce; or speculate about the impacts of future rules that EPA *might* adopt. These arguments face serious jurisdictional defects, as the United States and the Non-Governmental Organization and Trade Association (NGO) Respondents correctly note. (NGO Resp. Br. 23-32.) In any event, petitioners' claim that the ACE Rule's statutory interpretation is necessary to prevent EPA from overstepping its authority disregards important features of the underlying statutory scheme. Congress has already made the major policy choices to curb CO<sub>2</sub> emissions from existing power plants and to task EPA and the States with distinct responsibilities in a multi-step process to establish performance standards for such sources. And Congress also enacted other constraints on EPA's discretion in Section 7411 and the Act that

would more directly prevent the dire consequences that petitioners hypothesize, without resorting to the atextual and ahistorical interpretation of “best system of emission reduction” that the ACE Rule adopted.

### STATEMENT

1. Section 7411 of the Clean Air Act is one of the statute’s primary tools to address pollution from stationary sources, including power plants. Section 7411 adopts distinct regulatory approaches for new sources compared to existing sources. For new sources, Section 7411(b) authorizes EPA to directly set “standards of performance” for categories of stationary sources to curb their harmful emissions. 42 U.S.C. § 7411(b)(1)(A), (B). The statute defines “standard of performance” as:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

*Id.* § 7411(a)(1).

For *existing* sources in the same source categories, Section 7411(d) uses a familiar cooperative-federalism approach that is borrowed from the Section 7410 process for national ambient air quality standards. *See id.* § 7411(d)(1) (cross-referencing 42 U.S.C. § 7410); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 497-98 (2014). Instead of directly imposing

standards of performance on existing stationary sources, EPA promulgates regulations—known as emission guidelines—that contain EPA’s determination of “the degree of emission limitation achievable through the application of the best system of emission reduction.” 42 U.S.C. § 7411(a)(1) & (d)(1); 40 C.F.R. § 60.21a(e). “[I]n compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction.” *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*).

Under Section 7411(d), States have considerable flexibility in establishing performance standards for individual sources so long as they curb overall pollution to the levels provided in EPA’s guidelines. *See* 42 U.S.C. § 7416. For example, States need not require sources to implement the system of emission reduction that EPA has determined to be the “best.” States are also permitted to consider site-specific factors, such as a source’s remaining useful life or implementation costs, in establishing a standard for a particular source. *See* 40 C.F.R. § 60.24a(e). When EPA’s guidelines have included emission limits that each source must presumptively satisfy, *see e.g.*, Emission Guidelines for Sulfuric Acid Mist, 42 Fed. Reg. 55,796, 55,797 (Oct. 18, 1977), EPA has allowed state plans to rely on site-specific factors “to deviate from [these] generally applicable emission standards upon demonstration that costs are ‘[u]nreasonable,’” among other reasons. *AEP*, 564 U.S. at 427. In other instances, EPA has established statewide emission limits and provided for emissions averaging or trading programs that enable States to take site-specific factors into consideration when allocating responsibility for meeting the statewide targets. *See, e.g.*, Electric Utility Steam Generat-

ing Units, 70 Fed. Reg. 28,606, 28,649-50 (May 18, 2005) (mercury emissions from coal-fired power plants).<sup>1</sup>

Although States have flexibility in establishing standards for particular sources, EPA must ultimately ensure that state plans are “satisfactory,” 42 U.S.C. § 7411(d)(2)—i.e., they “assure that meaningful controls will be imposed,” State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340, 53,343-44 (Nov. 17, 1975). If a State does not submit a satisfactory plan, EPA must issue a federal plan that directly imposes standards of performance on the State’s existing sources. 42 U.S.C. § 7411(d)(2).

2. In response to this Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA determined that elevated atmospheric concentrations of six greenhouse gases, including CO<sub>2</sub>, endanger public health and welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496 (Dec. 15, 2009). These pollutants increase global average temperatures, cause sea levels to rise and coasts to erode; produce more intense, frequent, and long-lasting heat waves and wildfires; worsen smog; trigger longer and more severe droughts; and generate more intense storms and extreme weather events. *Id.* at 66,497-99. EPA and other agencies have emphasized the need for immediate efforts to reduce greenhouse-gas emissions in order to avoid “substantial damages on the U.S. economy, human health, and the environment,” including “billions of dollars” of annual economic

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<sup>1</sup> The D.C. Circuit vacated this rule for reasons unrelated to its emissions-trading program; specifically, it held that EPA had unlawfully delisted mercury-emitting power plants under 42 U.S.C. § 7412. See *New Jersey v. EPA*, 517 F.3d 574, 582-84 (D.C. Cir. 2008).

losses as well as “physical and ecological impacts” that are “irreversible for thousands of years” or even “permanent.”<sup>2</sup>

Fossil-fuel-fired power plants (predominantly coal- and gas-fired) emit about 25 percent of the nation’s greenhouse gases, by far the highest emissions of any sector of stationary sources.<sup>3</sup> (J.A.393-396, 1736 n.4.). Despite the widespread recognition of the need for limits on these emissions, existing power plants were not subject to federal CO<sub>2</sub> limits for many decades. In the absence of federal limits, several States passed laws to require existing power plants to reduce their CO<sub>2</sub> emissions. For example, in 2009, ten northeastern States launched the Regional Greenhouse Gas Initiative (RGGI), which caps the total amount of CO<sub>2</sub> collectively emitted by covered power plants, requires emitters to obtain emission allowances, and uses proceeds from auctioning allowances to invest in programs that reduce electricity prices. Participating States have reduced power-plant CO<sub>2</sub> emissions by about 50 percent, while seeing electricity prices fall by 5.7 percent.<sup>4</sup> California and Washington use similar cap-and-trade programs to limit CO<sub>2</sub> emissions from electricity generation and other sources. *See* 17 Cal. Code Regs § 95811; Wash. Rev. Code § 70A.65.005 et seq.

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<sup>2</sup> U.S. Global Change Research Program, *Fourth National Climate Assessment* vol. 2, at 1347 (rev. Mar. 2021) ([internet](#)). (For sources available on the internet, URLs are available in the table of authorities. All websites were last visited on January 18, 2022.)

<sup>3</sup> *See* EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019*, at ES-27 (2021) ([internet](#)).

<sup>4</sup> Acadia Ctr., *The Regional Greenhouse Gas Initiative: 10 Years in Review* p. 1 (2019) ([internet](#)).

In 2004, several of the State and Municipal Respondents also brought a federal common-law public-nuisance action seeking to impose CO<sub>2</sub> limits on some of the nation's largest power plants. That lawsuit culminated in this Court's ruling in *AEP* that the Clean Air Act had displaced any relevant federal common law with respect to harms from power-plant CO<sub>2</sub> emissions. The Court held that Section 7411 "speaks directly to emissions of carbon dioxide," *AEP*, 564 U.S. at 424 (quotation marks omitted), and authorizes "limits on emissions of carbon dioxide from domestic power-plants." *id.* at 424-25 (quotation marks omitted). The Court acknowledged that such regulation requires an "informed assessment of competing interests," including economic consequences, and held that Congress had "entrust[ed] such complex balancing to EPA in the first instance, in combination with state regulators." *Id.* at 427.

3. In 2015, EPA promulgated regulations under Section 7411 that required new and existing fossil-fuel-fired power plants to limit their CO<sub>2</sub> emissions. *See* Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (new sources). The Clean Power Plan was the Section 7411(d) rule for existing sources. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (reproduced at J.A.273-1668.)

In the Clean Power Plan, EPA began by considering which systems of reducing CO<sub>2</sub> emissions were "adequately demonstrated" for power plants in light of the unique characteristics of CO<sub>2</sub> as a pollutant and the unique features of the power sector. EPA found

that CO<sub>2</sub> cannot be removed at the smokestack as easily as other pollutants like sulfur dioxide, and that, unlike those pollutants, CO<sub>2</sub> principally causes global impacts regardless of where it is originally emitted. (J.A.397-401, 565-566.)

With respect to the nature of the power sector, EPA considered different types of measures that power plants could use to reduce their CO<sub>2</sub> emissions. For measures that reduce individual power plants' CO<sub>2</sub> emission rates, EPA determined that heat-rate improvements (i.e., increasing the efficiency of generating electricity) were adequately demonstrated and cost-effective and thus should be part of the "best" system; however, they would "lead to only small emission reductions for the source category." (J.A.577). EPA found that more substantial reductions were available from familiar approaches that power plants and state regulators had long relied on to reduce CO<sub>2</sub> or other emissions. Those approaches relied on the uniquely interconnected nature of the electric grid and the concomitant ability of power companies to cost-effectively shift generation to less-polluting sources. (J.A.578). Such "generation shifting" occurs as a matter of the routine operation of the electric grid, allowing the grid to satisfy demand while meeting "technical, environmental, and other constraints." (J.A.567.) EPA found that, due to falling prices for cleaner energy and the increasing costs of aging coal-fired plants, the power sector was already moving toward cleaner sources, and it expected those trends to continue. (J.A.352, 420-428, 894, 941-42.)

EPA identified several specific measures that the power sector had used for decades to substitute cleaner generation for higher-emitting generation. For example, power companies often have a mixed portfolio of

fossil-fueled and renewable generation resources, and routinely shift generation among these resources for environmental and economic reasons. (J.A.567, 898-899, 937-938.) As a result, a substantial degree of generation shifting could be accomplished within an owner's fleet, without involving any third parties. (See, e.g., J.A.898.) Power companies also regularly used contractual and state-created mechanisms, including "well-developed" renewable energy credit markets, to substitute generation from one unit for another, such as the replacement of fossil-fueled generation with renewable energy. (J.A.901, 942-944; see also J.A.902-903 (noting that similar crediting approach could work for gas-fired units).) States had relied on such measures to cost-effectively reduce CO<sub>2</sub> emissions from existing power plants, including in cap-and-trade programs like RGGI (J.A.568), or to provide sources with compliance flexibility under state renewable portfolio standards, which require that a certain percentage of electricity be generated using renewable energy (J.A.425, 934-944). And EPA too had used emissions trading programs under the Clean Air Act to reduce other pollutants from the power sector. (J.A.430-439.)

Based on this evidence, EPA determined that the best system for reducing CO<sub>2</sub> emissions from existing power plants consisted of three "building blocks": (1) improving heat rates at coal-fired power plants; (2) substituting generation from existing natural gas power plants for generation from existing coal-fired power plants; and (3) substituting generation from new zero-emitting renewable energy sources for generation from existing fossil-fuel-fired plants. (J.A.657.)

EPA considered including other measures in the best system, such as carbon capture and storage, or co-firing coal-fired power plants with natural gas.

Although EPA found that these measures were feasible and cost-effective and could potentially achieve significant emission reductions, it ultimately did not include them because it found that they would be more expensive than the generation-shifting measures that power companies were already utilizing. (J.A.578.) Indeed, power companies made clear their preference to meet emission limits by shifting generation to lower- or zero-emitting sources because doing so would be cheaper than—yet still as effective as—these other measures. (J.A.578, 603 n.380.)

EPA then quantified the degree of emission limitation achievable under its determination of the best system for two subcategories of power plants—steam units (primarily coal-fired) and gas-fired combustion turbines—based on historical trends in heat-rate improvements (J.A.867) and projections about the capacity of gas plants and new renewable generation (J.A.890-891, 958). In determining these emission reductions, EPA used conservative estimates and built in significant compliance “headroom” to ease power plants’ ability to achieve state performance standards. (J.A.300, 531, 643.) To provide States with flexibility in designing state plans, EPA then issued state-specific emission goals for 2030. (J.A.1008-1012.) EPA expressly allowed States to consider site-specific factors, such as remaining useful life, to vary the emission rates of individual plants, provided that the overall state goals were met. (J.A.1240-1256.)

EPA predicted that the Plan would achieve relatively modest CO<sub>2</sub> emission reductions when fully implemented in 2030: a 32 percent reduction below 2005 levels and a 16 percent reduction from forecasted 2020 levels. (J.A.1489-1490.) The agency also estimated that coal-fired power plants would continue to

provide a significant share of the country's electricity generation—27.4 percent, a decrease of 5.4 percentage points over ten years as compared to the status quo.<sup>5</sup> By way of comparison, EPA noted that coal's share of electricity generation had decreased by more than 5.4 percent during the past decade, even without any federal CO<sub>2</sub> regulations. (J.A.843-844.)

Various parties sought review of the Clean Power Plan in the D.C. Circuit, which denied a stay. *See West Virginia v. EPA*, No. 15-1363 (Jan. 21, 2016) (consolidated cases). Several petitioners then filed stay applications with this Court. Application for Stay, *West Virginia v. EPA*, No. 15A773 (Jan. 26, 2016). West Virginia asserted that a stay was necessary to prevent the States from “suffer[ing] immense sovereign and financial harms as a direct result of the Plan.” *Id.* at 39-40. This Court granted the applications. *See West Virginia v. EPA*, 577 U.S. 1126 (2016).

4. In 2019, following a change in presidential administrations, EPA issued the ACE Rule, which repealed and replaced the Clean Power Plan. Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019) (reproduced at J.A.1725-2030).<sup>6</sup> In repealing the Clean Power Plan, EPA made what its general counsel referred to as a “bold” “strategic choice” to construe Section 7411 as unambiguously precluding the Plan.<sup>7</sup> The ACE Rule thus relied on the view that the Clean

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<sup>5</sup> EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* 3-27 (Oct. 23, 2015) ([internet](#)).

<sup>6</sup> After the finalization of the ACE Rule, the D.C. Circuit dismissed the earlier challenges to the Clean Power Plan. *West Virginia v. EPA*, No. 15-1363 (Sept. 17, 2019), CADC doc. 1809652.

<sup>7</sup> *Facing Risks, EPA's Counsel Defends 'Bold' ACE Rule Legal Interpretation*, Inside EPA (Aug. 2, 2019) ([internet](#)).

Air Act limited the best system of emission reduction to “measures that can be applied to and at the level of the individual source.” (J.A.1769.) EPA concluded that its new interpretation precluded the agency from relying on certain measures that States and power companies had already been implementing to reduce CO<sub>2</sub> emissions based on power plants’ unique interconnection on the electric grid. Accordingly, the ACE Rule limited the best system for coal-fired power plants to a handful of minor efficiency (heat-rate) improvements. (J.A.1800-1825.) With respect to gas-fired power plants, EPA found that it could not identify *any* best system at all. (J.A.1791-1792.)

Rather than providing States with benchmark emission limitations, the ACE Rule instead presented States with a list of heat-rate improvements to be evaluated along with an expected—but nonbinding—range of outcomes. (J.A.1803-1809.) Abandoning EPA’s long-held support for state flexibility, the ACE Rule also expressly prohibited States and sources from complying with EPA’s guidelines by using emissions averaging or trading programs because these measures “would undermine the EPA’s determination of the [best system] in this rule.” (J.A.1895-1901.)

In analyzing the effect of repealing the Clean Power Plan, EPA did not find that the repeal would avert “immense sovereign and financial harms,” as several of the petitioning States had previously claimed. Application for Stay at 39-40, *West Virginia v. EPA*. Instead, the agency found that the repeal would save *zero* costs. (J.A.1672.) That finding reflected the fact that, even though the Plan never went into effect, power plants had continued—and even accelerated—reductions in CO<sub>2</sub> emissions such that the sector would meet the Plan’s emission-reduction goals for 2030

nearly a decade early. (J.A.1690-1693.) Moreover, EPA found that implementing the ACE Rule would lower power-sector CO<sub>2</sub> emissions by less than one percent by 2030.<sup>8</sup> And in more than a dozen States, emissions would *increase* compared to a baseline of no regulation at all.<sup>9</sup>

5. The State and Municipal Respondents, along with several power companies and nongovernmental organizations, challenged the ACE Rule in the D.C. Circuit. *See American Lung Ass’n v. EPA*, No. 19-1140 (and consolidated cases). The court of appeals held that the “ACE Rule must be vacated and remanded to the EPA” because it rested “squarely on the erroneous legal premise that the statutory text expressly foreclosed consideration of measures other than those that apply at and to the individual source.” (J.A.214.).

The court identified three textual flaws with EPA’s stated rationale for repealing the Clean Power Plan. First, the definition of the term “best system of emission reduction” in Section 7411(a)(1) “announces its own limitations,” which “simply do not include the source-specific caveat that the EPA now interposes and casts as unambiguous.” (J.A.106.) Second, there is no basis for EPA’s assertion that the language of subsection (d)(1) concerning state performance standards for individual sources “must be read upstream” into the definition of the best system in (a)(1). (J.A.106-107.) Third, even assuming subsections (a)(1) and (d)(1)

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<sup>8</sup> EPA, *Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units* ES-6 (2019) ([internet](#)).

<sup>9</sup> EPA, *Illustrative ACE Scenario, State Emission Projections* (2019) ([internet](#)).

could be so combined, EPA had improperly made an “unexplained replacement of the preposition ‘for’ in ‘standards of performance for any existing source’ [the language in subsection (d)(1)] with the prepositions ‘at’ and ‘to,’” which do not appear in that phrase. (J.A.107.) The court further rejected the ACE Rule’s prohibition of certain compliance measures by States, such as emissions averaging and trading, because that prohibition was tied to its “flawed interpretation of the statute as unambiguously confined to measures taken ‘at’ individual plants.” (J.A.132-133.)

The court of appeals also rejected the argument that its interpretation of “best system of emission reduction” would allow EPA to resolve major questions in a way that Congress did not intend. First, the court noted that EPA’s regulation of CO<sub>2</sub> emissions from existing power plants was expressly authorized by Section 7411(d) as interpreted by *AEP*. (J.A.137.) Second, the court found that the Clean Power Plan’s incorporation of “generation-shifting measures” was neither radical nor transformative because such “measures . . . are already widely in use by States and power plants.” (J.A.145.)<sup>10</sup>

EPA subsequently filed an unopposed motion with the court of appeals to withhold issuance of the mandate insofar as it would require reinstatement of the Clean Power Plan. EPA explained that it was beginning a new rulemaking to address CO<sub>2</sub> emissions

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<sup>10</sup> Judge Walker concurred in part and dissented in part. He would have held that the ACE Rule was invalid on the ground that EPA’s regulation of hazardous air pollutants from power plants under Section 7412 of the Act precludes the agency from limiting power-plant CO<sub>2</sub> emissions under Section 7411(d). (J.A.217, 233.) This Court did not grant certiorari on the Section 7412 issue.

from existing power plants, and therefore had no intention of implementing the Clean Power Plan (or the ACE Rule). The court granted EPA's motion. (J.A.270-272.) EPA's rulemaking remains ongoing. *See* EPA Status Report at ¶4 (Jan. 17, 2022), CADC. doc. 1930863.

### SUMMARY OF ARGUMENT

I.A. The ACE Rule misinterpreted Section 7411 as unambiguously limiting EPA's choice of the "best system of emission reduction" to "measures that can be applied to and at the level of the individual source." (J.A.1769.) That limitation appears nowhere in the text of Section 7411(a)(1). And Congress knew how to write such a limitation, if it had intended to include one: narrower language focusing EPA on specific types of emission-reduction tools appears elsewhere in Section 7411 and the Act, but not in Section 7411(a)(1)'s authorization for EPA to determine the best system.

The ACE Rule attempted to justify its "to and at the source" interpretation by splicing together language from Section 7411(a)(1) and (d)(1) and relying on language in (d)(1) that it deemed to be focused on "individual sources." (J.A.1746-1747.) But these two provisions govern distinct phases of the regulatory process: (a)(1) directs EPA to determine the best system of emission reduction for the source category, while (d)(1) directs States to establish standards of performance for individual sources. Any source-specific language in (d)(1) thus describes the distinct role of the States; it does not limit EPA's threshold determination of the best system.

The ACE Rule's overly restrictive reading of "best system of emission reduction" also disregarded

Congress's repeated recognition in other statutory provisions that measures such as cap-and-trade programs, which involve multiple entities, can cost-effectively reduce emissions from regulated sources. State regulators and private industry have also relied on such measures to reduce CO<sub>2</sub> from power plants. The broader phrase "system of emission reduction" is sensibly read to include specific measures of emission reduction that Congress, the States, and the power sector have long recognized and implemented.

B. The ACE Rule was invalid for the independent reason that it prohibited States and sources from achieving EPA's emission guidelines by using emission-reduction measures involving multiple entities. That prohibition was inconsistent with the plain text of the Act, which allows States and sources to use any measures they choose to reduce emissions so long as state plans achieve at least the degree of emission reduction set forth in EPA's guidelines.

Disregarding this feature of the ACE Rule, petitioners instead contend that it was the decision below that violated the Act's requirements for state flexibility. But the court of appeals properly respected Section 7411's cooperative-federalism regime and the state flexibility that Congress built into that process. Petitioners' complaint that the Clean Power Plan did not leave the States with sufficient flexibility is both incorrect and immaterial here because the Plan is not the rule under review and will not be enforced by EPA going forward.

C. The ACE Rule’s statutory interpretation is not needed to ensure appropriate constraints on EPA’s discretion in selecting the best system. Petitioners’ slippery-slope arguments ignore the fact that Section 7411 and the Act contain numerous other limitations on EPA. Among those limitations is the requirement that EPA select measures that are “adequately demonstrated,” taking into account the nature of both the industry being regulated and the pollutant to be controlled. EPA must also consider energy requirements and the cost of achieving pollution reductions—limitations that more directly address petitioners’ concerns about unduly burdensome rules than the ACE Rule’s atextual “to and at the source” limitation.

Petitioners are also wrong to suggest that the decision below endorsed the Clean Power Plan in its entirety. The court of appeals considered only the specific interpretation of “best system of emission reduction” that the ACE Rule relied on as its exclusive rationale to repeal the Plan. The court accordingly did not review, let alone approve, other features of the Plan—including, for example, its inclusion of nonemitting facilities that are not regulated by the Act, or its reliance on new rather than existing renewable facilities in setting the stringency of its emission guidelines. A court could thus still consider the validity of these features if they are adopted by EPA in its forthcoming rule.

II. This case does not resemble those in which this Court has found that an agency exceeded its core regulatory mission and decided major questions that Congress did not intend it to address. To the contrary, as this Court has already held, Congress made the major policy choices here to curb CO<sub>2</sub> emissions from existing power plants and to utilize a cooperative-

federalism framework with distinct roles for both EPA and the States. These choices are incompatible with petitioners' assertion that Congress intended to reserve for itself the complex and technical task of establishing standards of performance for existing power plants.

Petitioners assert that EPA might make particular choices in determining the best system of emission reduction that would be so "transformative" as to raise a major question outside of the agency's authority to resolve. But without any extant rule that concretely affects petitioners, that concern is purely speculative. Equally speculative is petitioners' concern that EPA's forthcoming rule will unduly disrupt the federal-state balance. Nothing in the decision below purports to deviate from Section 7411's familiar cooperative-federalism framework.

### ARGUMENT

The court of appeals decided a "relatively discrete" question about the validity of a statutory interpretation that the ACE Rule had chosen as its sole basis for repealing the Clean Power Plan. (J.A.102.) Specifically, the Rule had construed the phrase "best system of emission reduction" in Section 7411(a)(1) as being unambiguously limited to "measures that can be applied to and at the level of the individual source." (J.A.1796.) And it further found that this purportedly unambiguous meaning not only constrained EPA's emission guidelines but also barred States and sources from using compliance measures other than those that apply "to and at" an individual source. (J.A.1893-1894.)

The court of appeals correctly rejected the ACE Rule's statutory interpretation. That narrow ruling did not, as petitioners contend, leave EPA with "unfettered

discretion” (Westmoreland Mining Holdings (Westmoreland) Br. 43) to regulate “any producer in any economic sector—or really any building owner” (W.Va. Br. 23); indeed, the court acknowledged other textual constraints on EPA’s determination of the best system. The ruling similarly raises no concerns about improper agency resolution of major questions or impermissible legislative delegation in light of the many indications in Section 7411 that Congress made the major policy choices here—including the choice to regulate CO<sub>2</sub> emissions from power plants, and the choice to employ a cooperative-federalism regime under which EPA and the States have distinct, well-defined responsibilities. Assuming that this Court has jurisdiction (*see* NGO Resp. Br. 23-32), it should affirm the judgment below.

## **I. The ACE Rule Relied on an Erroneous Interpretation of Section 7411.**

### **A. The Text and Structure of Section 7411 Do Not Support the ACE Rule’s Narrow Interpretation of “Best System of Emission Reduction.”**

1. a. Any analysis of EPA’s authority under Section 7411 “begins with the statutory text.” *National Ass’n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 631 (2018) (quotation marks omitted). The ACE Rule repealed the Clean Power Plan on the sole theory that Section 7411 unambiguously limits EPA’s determination of the “best system of emission reduction” to “measures that can be applied to and at the level of the individual source,” standing alone, and thus categorically precludes emission guidelines “premised on a system of emission reduction that is implementable only through the combined activities of sources or non-

sources.” (J.A.1747, 1769, 1784, 1796.) But no language in Section 7411(a)(1) imposes this “to and at the source” limitation on EPA’s selection of the best system. The absence of such limiting language is meaningful. “It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts.” *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (quotation marks omitted). And that principle specifically forbids courts from “imposing limits on an agency’s discretion that are not supported by the text.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

The absence of any express “to and at the source” limitation in Section 7411(a)(1) is particularly striking because that provision explicitly constrains EPA’s determination of the best system in other ways, including by requiring that the best system be “adequately demonstrated.” See *infra* at 33-38. Congress also knows how to narrow EPA’s focus to “more specific categories of emission-reduction tools.” (J.A.120.) Section 7411 itself does so in other provisions that refer more narrowly to a “*technological* system” of emission reduction. 42 U.S.C. § 7411(h) & (j) (emphasis added). Similarly, other provisions of the Clean Air Act refer to “retrofit technology” (i.e., updated equipment), *id.* § 7491(b)(2)(A), (g)(2); see also *id.* § 7651f(b)(2); to measures that “collect, capture or treat . . . pollutants when released,” *id.* § 7412(d)(2)(C); or to specific measures like “fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques,” *id.* § 7479(3). These other provisions demonstrate that “Congress could have taken a more parsimonious approach,” *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020), to EPA’s selection of the “best system of emission reduction” in Section 7411(a)(1). But Congress omitted any such

limitations. This Court “do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [its] reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.” *Jama v. ICE*, 543 U.S. 335, 341 (2005); *see also National Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.”).

Instead, Section 7411(a)(1) refers simply to the “best system of emission reduction.” Nothing about this phrase supports the ACE Rule’s “to and at the source” limitation. The ordinary meaning of “system” refers to “a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose,” *Webster’s Third New International Dictionary of the English Language Unabridged* 2322 (1968); *see also Merriam-Webster Dictionary* s.v. system (2021) (defining “system” as any “interdependent group of items” that “serv[e] a common purpose”). What ties together the components of a “system of emission reduction” is that they are all measures that are directed toward the shared objective of reducing emissions from regulated sources—regardless of whether they take into account actions by just one entity, or many. *Cf., e.g., National Defense Authorization Act for Fiscal Year 2012*, Pub. L. 112-81, § 2841(b), 125 Stat. 1298, 1696 (requiring design of a “health care system” consisting of multiple components, including a medical plan, contractor-provided health services, and access to local healthcare assets).

Similarly, the phrase “emission reduction” does not support the ACE Rule’s interpretation because there is no dispute that measures implementable through the

combined activities of multiple entities can meaningfully reduce regulated sources' emissions. Indeed, the Rule admitted that the measures considered by the Clean Power Plan—including measures that would increase the relative production of lower-polluting sources on the electric grid—could be “a workable policy for achieving sector-wide carbon-intensity reduction goals.” (J.A.1785.) That admission reflected the practical reality that States and power plants have extensive experience with strategies involving multiple entities as a cost-effective means of reducing CO<sub>2</sub> emissions. (J.A.568-569.) See *supra* at 8-9.

Congress's decision not to include narrowing language in Section 7411(a)(1) was a deliberate one. Before enacting Section 7411 during the 1970 legislative session, both chambers considered language that would have more specifically referred to the types of control measures that EPA could consider in selecting the best system of emission reduction. See S. 4358, 91st Cong. § 6 (1970) (“the latest available control technology, processes, operating methods, or other alternatives”); H.R. 17255, 91st Cong. § 5 (1970) (requiring the use of “available technology” for new sources only). But Congress chose instead the broader phrase “best system of emission reduction” for Section 7411(a)(1). Similarly, from 1977 through 1990, Congress temporarily limited EPA's choice of controls for *new* sources to “the best technological system of continuous emission reduction.” See Clean Air Amendments Act of 1977, Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 685, 700; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 403(a), 104 Stat. 2399, 2631. But at no time has Congress imposed the same restriction on EPA's choice of systems for *existing* sources. Its decision not to do so precluded EPA from engrafting such extratextual

limitations on the statute in the ACE Rule. *See Little Sisters of the Poor*, 140 S. Ct. at 2380 (rejecting limits on agency authority when “Congress could have limited [the agency’s] discretion in any number of ways, but it chose not to do so”).

b. The ACE Rule defended its “to and at the source” interpretation by making a grammatical argument centered on the word “application.” (*See* J.A.1744-1747.) According to the Rule, the relevant phrase in Section 7411(a)(1)—“through the application of the best system of emission reduction”—required EPA to identify an “indirect object” to which the “best system” would be applied. (J.A.1746.) The Rule then reasoned that a different subsection—Section 7411(d)(1)—“provides that the indirect object is the ‘existing source,’” based on the latter subsection’s requirement that States establish “standards of performance for any existing source.” (J.A.1746.) The Rule concluded that this splicing together of Section 7411(a)(1) and (d)(1) “unambiguously limits the [best system of emission reduction] to those systems that can be put into operation *at* a building, structure, facility, or installation.” (J.A.1746) (*italics in original*.)

For several independent reasons, the ACE Rule’s reasoning is not persuasive, let alone unambiguously compelled by the text. *First*, the Rule erred in assuming that the phrase “application of the best system of emission reduction” in Section 7411(a)(1) is grammatically incomplete in a way that requires the identification of an indirect object at all. As the court of appeals correctly recognized, the noun “application” does not require an indirect object but is instead a “nominalization” that “enables the drafter to leave certain information unspecified—namely, who is acting and where their action is directed.” (J.A.113-114.) In similar

contexts, where Congress chooses a grammatical construction that allows for the omission of a part of speech—for example, omitting the subject by using the passive voice—that choice ordinarily reflects Congress’s “agnosticism” about the part of speech that is not used; it does not constitute a clear command to fill in the missing part of speech in a specific way. *See Watson v. United States*, 552 U.S. 74, 81 (2007); *Lehrfeld v. Richardson*, 132 F.3d 1463, 1465-66 (D.C. Cir. 1998).

*Second*, even if a particular indirect object were grammatically necessary, such an indirect object can typically be inferred from context and does not require an explicit textual reference. Here, as the court of appeals observed, “other contextually appropriate indirect objects” would include the source category or the emissions themselves. (J.A.115.) Nothing required EPA to identify a specific indirect object elsewhere in Section 7411.

*Third*, the text of Section 7411(d) does not support the ACE Rule’s grammatical claim that the “best system of emission reduction” must be applied exclusively “to” or “at” the source of emissions. The relevant language in Section 7411(d)(1) references “standards of performance for any existing source for any air pollutant.” But the Rule then departs from this text in two ways. For one thing, although subsection (d)(1) uses “for any existing source” to modify “standards of performance,” the Rule instead uses it to modify subsection (a)(1)’s “best system of emission reduction”—a phrase that is only *part* of the definition of “standard of performance” and thus cannot simply be substituted into subsection (d)(1). (J.A.111.) In addition, although the language in subsection (d)(1) uses the preposition “for,” the ACE Rule concludes that the “best system of emission reduction” must be “put into operation *at* a building,

structure, facility, or installation,” or applied “to the designated facility.” (J.A.1746-1747 (second emphasis added).) As the court of appeals observed, “[t]he word Congress actually used—‘for’ the source—lacks the site-specific connotation on which the [Rule’s] case depends.” (J.A.116.) For example, a reservation system “for” a hotel may be handled off-site as well as “at” the hotel’s front desk. “[N]owhere in the ACE Rule does the EPA explain this swap of one preposition for two meaningfully more restrictive ones.” (J.A.117.) Thus, the Rule’s interpretation of “best system of emission reduction” in Section 7411(a)(1) depends on a reading of the statute that is not consistent with “the words on the page,” *Bostock*, 140 S. Ct. at 1738.

2. The ACE Rule’s narrow interpretation of “best system of emission reduction” also conflicts with the broader structure of Section 7411 and the Clean Air Act.

*First*, the Rule makes a fundamental mistake in using language from Section 7411(d)(1) to limit EPA’s determination of the best system in Section 7411(a)(1) because the two provisions govern distinct phases of the regulatory process. Subsection (a)(1) directs EPA to “study all ‘adequately demonstrated’ means of emission reduction” and then to draw on that analysis “to determine the ‘best’ system to reduce emissions” for the source category. (J.A.108.) EPA’s determination of the best system informs its emission guidelines, and those guidelines in turn provide the criteria under which “the States then issue performance standards for stationary sources within their jurisdiction” pursuant to subsection (d)(1). *AEP*, 564 U.S. at 424.

In other words, EPA determines the best system under subsection (a)(1) and issues emission guidelines for the entire source category *before* States set perform-

ance standards for individual sources under subsection (d)(1). Petitioners do not dispute that EPA's threshold determination of the best system at the start of this process evaluates many of the other statutory factors—including costs, health and environmental impacts, and energy requirements—on a sector-wide as well as individual-source level. (J.A.808.) See *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981). It would be anomalous if the same scope did not govern EPA's responsibility to identify the measures of emission reduction that are “adequately demonstrated” for the source category and thus should be considered for inclusion in the best system. By contrast, the statutory language in subsection (d)(1) identified by petitioners as reflecting a “source-specific focus” (N. Am. Coal Corp. (NACCO) Br. 33; see also *id.* 35-37) pertains to the States' establishment of standards of performance for particular sources; it does not restrict EPA's threshold responsibility under Section 7411(a)(1) to select the “best system of emission reduction.”

*Second*, the ACE Rule's restrictive reading of “best system of emission reduction” conflicts with the fact that Congress has repeatedly recognized, in multiple other statutory provisions, that measures can cost-effectively reduce emissions through the activities of multiple entities, including through cap-and-trade programs. For example, in Section 7410 of the Act—a statute whose cooperative-federalism scheme Section 7411 expressly references, see 42 U.S.C. § 7411(d)(1)—Congress recognized that air quality could be improved not only by “enforceable emission limitations” but also by “other control measures” including, specifically, “marketable permits, and auctions of emissions rights.” *Id.* § 7410(a)(2)(A). Similarly, in Title IV of the Act, Congress established a trading scheme as part of the

“emission limitation programs” to address acid rain, *see* 42 U.S.C. § 7651b(a)(1), and specifically found that this “emission allocation and transfer system” provided a way for sources to meet “prescribed emission limitations,” *id.* § 7651(b). Petitioners argue (W.Va. Br. 42) that these other programs are inapposite because their implementing statutes specifically mention trading, but that argument ignores the explicit textual link between Sections 7410 and 7411, as well as the fact that Congress chose to use broader language in Section 7411—“system of emission reduction”—than in the statutes that petitioners discuss. There is nothing suggesting that Congress silently intended the phrase “system of emission reduction” to exclude measures that involve multiple entities, while elsewhere recognizing such measures to be effective methods for reducing air pollution.

More broadly, States (including several of the petitioners) have long relied on trading programs as one tool to help reduce pollution, in both state-specific schemes and regional programs such as RGGL.<sup>11</sup> *See, e.g.,* W.Va. Code § 22-5-18; 30 Tex. Admin. Code § 101.300 *et seq.* *See also supra* at 9. The power sector likewise “has a long and well-established history” of

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<sup>11</sup> Indeed, every State that is a petitioner here previously supported cap-and-trade programs as a means of emission reduction in connection with the Clean Air Mercury Rule, a Section 7411 rule. These States (except one, which accepted a federal plan) informed EPA that they planned to participate in a national cap-and-trade program that EPA intended to establish. *See, e.g.,* 73 Fed. Reg. 3,194 (Jan. 17, 2008) (Missouri); 72 Fed. Reg. 72,978 (Dec. 26, 2007) (Kansas); 72 Fed. Reg. 46,161 (Aug. 17, 2007) (Louisiana); *see also* National Assoc. of Clean Air Agencies, State Mercury Programs for Utilities (Dec. 4, 2007) ([internet](#)) (summary table of state plan submissions).

engaging in multi-entity actions, including trading, “for the purpose of reducing CO<sub>2</sub> emissions—and certainly always with the effect of reducing emissions.” (J.A.771-772, 805-806; see *Power Company Resp. Br.* 35-41.) This Court recently relied on similar examples of “pre-existing state requirements” and industry experience to uphold a COVID-19 vaccination rule by the Centers for Medicare and Medicaid Services, pointing to analogous vaccine policies by the States and public-health sector as support for the federal agency’s authority to do the same under its power to protect “health and safety.” *Biden v. Missouri*, No. 21A240, 2022 WL 120950, at \*3-4 (U.S. Jan. 13, 2022) (per curiam). Here, too, the widespread state and industry practice of reducing emissions through the actions of multiple entities supports an interpretation of “best system of emission reduction” that would include such measures.

**B. The ACE Rule’s Statutory Interpretation Improperly Constrained the States’ Compliance Choices.**

1. The ACE Rule’s interpretation of Section 7411 was invalid for the additional reason that it forbade States and sources alike from achieving EPA’s emission guidelines by relying on commonly used methods of emission reduction involving multiple entities—including cap-and-trade programs—for no reason other than that such methods “would be inconsistent with the EPA’s interpretation of the [best system of emission reduction] as limited to measures that apply at and to an individual source and reduce emissions from that source.” (J.A.1893; see also J.A.1914-1915.)

This constraint on state compliance measures finds no support in the statutory text. (J.A.133.) Instead, it

conflicts with the cooperative-federalism regime that Congress established for regulating existing sources. Section 7411(d) empowers States in the first instance to establish standards of performance for sources within their jurisdictions. And Congress expressly provided that “nothing in [the Act] shall preclude or deny the right of any State . . . to adopt or enforce (1) *any* standard or limitation respecting emissions of air pollutants or (2) *any* requirement respecting control or abatement of air pollution,” so long as such standard, limitation, or requirement is at least as stringent in curbing emissions as one “in effect . . . under section 7411” of the Act. 42 U.S.C. § 7416 (emphases added).

In other words, so long as States adopt plans under Section 7411(d) that achieve emission reductions equal to or greater than the minimum required by the emission guidelines issued by EPA under Section 7411(a)(1), EPA has no lawful basis to interfere with the manner in which state plans regulate sources within their borders. *See Union Electric Co. v. EPA*, 427 U.S. 246, 264 (1976) (discussing Section 7410). In particular, although EPA must identify a “best system of emission reduction” in order to promulgate its emission guidelines under Section 7411(a)(1), States need not follow EPA’s choice of the best system if they may achieve equal or greater emission reductions through some other means. EPA’s “need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn.” *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 328 (2014) (*UARG*).

2. Petitioners largely ignore the ACE Rule’s explicit and unprecedented constraint on state compliance measures. Instead, Petitioner North Dakota asserts that it is the court of appeals’ decision, not the Rule, that somehow overrides state flexibility under Section 7411.

(North Dakota (N.D.) Br. 5.) But nothing in the decision below disturbed Section 7411's framework for regulating existing sources, which borrows the familiar cooperative-federalism regime governing national ambient air quality standards under Section 7410. As this Court has long recognized, this structure "plainly charge[s]" EPA with the authority to issue binding general guidelines, but then leaves to the States "the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the [federal] standards [EPA] has set are to be met." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975). The court of appeals' decision preserves these roles by upholding EPA's authority to determine the best system of emission reduction while rejecting the ACE Rule's improper constraints on States' discretion to choose compliance measures that achieve those federal guidelines. (J.A.98-100.)

To be sure, EPA's emissions guidelines will constrain state discretion to at least some degree. But that effect is the intended result of the cooperative-federalism scheme. As this Court has previously explained, in describing the analogous process for national ambient air quality standards, "the statute speaks without reservation" about the substantive requirements that a State must address, and EPA has a "statutory duty" to ensure that States comply with these minimum requirements. *EME Homer City*, 572 U.S. 489 at 508-09. Indeed, Section 7411 expressly authorizes EPA to review state plans to ensure that they are "satisfactory," 42 U.S.C. § 7411(d)(2)(A), confirming that EPA has the authority to ensure that minimum federal requirements are satisfied. And the federal oversight role conferred by Section 7411 is particularly important where a pollutant—such as

CO<sub>2</sub>—is “heedless of state boundaries” and thus inflicts cross-state harms that States have limited power on their own to curb. See *EME Homer City*, 572 U.S. at 496; see also *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 486 (2004). The court of appeals’ decision properly respects this essential federal role.

Some petitioners separately raise the fear that, in practice, the court of appeals’ interpretation of “best system of emission reduction” in Section 7411(a)(1) will allow EPA to promulgate emission guidelines that effectively leave the States with no discretion in setting source-specific standards. (*E.g.*, N.D. Br. 45; W.Va. Br. 29-30.) But the court of appeals’ reasoning does not lead to any such inevitable interference with state authority. The court held only that EPA was permitted to consider emission-reduction measures beyond those that apply “to or at” an individual source; it did not hold that EPA was required to adopt them, let alone that EPA must employ those measures in such a manner that the resulting federal guidelines would eliminate state flexibility. (J.A.104, 161, 214.) Petitioners appear to assume that any consideration by EPA of “outside-the-fenceline measures” (W.Va. Br. 42) will necessarily “tie the States’ hands” (N.D. Br. 36) in setting source-specific performance standards, but there is no such inherent connection. To the contrary, multi-entity measures like trading and averaging schemes are widely acknowledged to reduce the costs of complying with emission limits and thus to provide additional, not fewer, options to States and regulated sources.<sup>12</sup> (J.A.430-439, 609-610.)

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<sup>12</sup> Petitioners are incorrect in arguing (W.Va. Br. 29) that the Clean Power Plan violated Section 7411(d)(1) by preventing States

(continues on next page)

Petitioners' complaint that the Clean Power Plan's emission targets were "reverse-engineered" to force the States to facilitate "shifting generation" (W.Va. Br. 29-30) is irrelevant to the issue before the Court because the Clean Power Plan is not the rule under review and will not be enforced by EPA. Given that EPA is in the midst of considering a new rule for existing power plants, it is at best premature to assume that the agency will replicate the Clean Power Plan's specific approach in any future rulemaking. *See EME Homer City*, 572 U.S. at 524 (recognizing that a "State may bring a particularized, as-applied challenge" if EPA's guidelines in fact prove unduly restrictive).

Petitioners' complaint is also wrong. The Clean Power Plan provided States and sources with several forms of "compliance headroom" and set emission guidelines "not at the maximum possible degree of stringency but at a reasonable degree of stringency." (J.A.531-532, 590, 597.) EPA identified numerous methods of emission reduction besides increasing lower-polluting generation that would have been "capable of helping affected [sources] achieve compliance with standards of performance" (J.A.706), including heat-rate improvements; carbon capture and storage; fuel-switching to natural gas or biomass; waste-to-heat energy conversion; demand-side energy efficiency; and investments to reduce transmission and distribution

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from considering a source's "remaining useful life" in setting source-specific performance standards. The relevant portion of the Plan cited by petitioners said only that the *statewide* goals established by the Plan's emission guidelines could not be adjusted based on "facility-specific factors," including "remaining useful life." (J.A.1237, 1244-1246.) But States could consider such factors in establishing performance standards for "each individual existing source." (J.A.1240-1244.)

losses. (J.A.703-715.) The Clean Power Plan thus confirms that there is no inherent connection between “outside-the-fenceline measures” (W.Va. Br. 42) and undue restrictions on state flexibility.

**C. The ACE Rule’s “To and At the Source” Interpretation Is Not Necessary to Ensure Appropriate Limitations on EPA’s Regulatory Authority.**

1. Petitioners repeatedly argue that, by rejecting the ACE Rule’s “to and at the source” interpretation, the court of appeals necessarily vested EPA with “power to impose an indefinite series of transformative measures on practically every industrial facility, office building, community center, and home across the Nation.” (Westmoreland Br. 29.) They are mistaken. This argument depends on taking out of context the court’s observation that Section 7411(a)(1) “impose[s] no limits on the types of measures the EPA may consider.” (J.A.108.) That statement was made to explain that the phrase “best system of emission reduction” does not limit EPA to considering only measures that can be implemented “to and at the source.” But the court elsewhere plainly and correctly recognized that other “substantial and explicit constraints on the EPA’s selection of a best system of emission reduction” would preclude the dire scenarios posited by petitioners. (J.A.146.) Those textually grounded constraints—none invoked by the Rule as a basis to repeal the Clean Power Plan—provide ample safeguards against the exercise of unconstrained power conjured by petitioners. *See UARG*, 573 U.S. at 331 (identifying “important limitations” in the statute “that may work to mitigate petitioners’ concerns about ‘unbounded’ regulatory authority”).

To begin with, as EPA acknowledged when it issued the Clean Power Plan, the fact that States must ultimately establish standards of performance “for existing sources,” 42 U.S.C. § 7411(d)(1), imposes “significant constraints on the types of measures that may be included” (J.A.733-734). For example, the best system must “assure emission reductions from the affected sources” themselves, thus precluding EPA from relying on measures that address CO<sub>2</sub> pollution in some other way, like “the planting of forests to sequester CO<sub>2</sub>” (J.A.803) or requiring sources to “invest[] in electric cars” (Westmoreland Br. 28; *see* J.A.806-807). Likewise, the measures must be of a type that regulated sources can implement (J.A.543, 804), thus precluding measures such as demand-side regulations that “target[] consumer-oriented behavior” (J.A.813-815) or prohibitions on the “import or export of carbon-intensive goods” (W.Va. Br. 19).<sup>13</sup>

Additional constraints come from Section 7411’s direction that the best system of emission reduction be “adequately demonstrated.” That requirement obligates EPA to examine “the history of the effectiveness of the controls or other measures, or other indications of their effectiveness.” (J.A.804.) And proof of adequate demonstration must be tailored to “the nature of the regulated industry and the nature of the pollutant” at issue (J.A.804), thus precluding EPA from adopting a one-size-fits-all approach to all sectors under its juris-

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<sup>13</sup> West Virginia is wrong to claim that the decision below “instructs EPA to consider demand-side (that is, consumer-focused) measures as an option.” (W.Va. Br. 19.) The footnote cited by West Virginia (J.A.143 n.9) says no such thing. And in the next footnote, the court of appeals correctly explained that *States* could rely on demand-side measures to comply with EPA’s guidelines. (J.A.144 n.10.)

diction. In the Clean Power Plan, for example, EPA found that measures that reduced CO<sub>2</sub> emissions through the activities of multiple entities, rather than from the actions of individual sources acting alone, were effective at addressing the harms from CO<sub>2</sub> because a distinct feature of that pollutant was that it principally caused global harms not dependent on the origin of the pollution. (J.A.530-531, 565-566, 607-608.) Similarly, EPA found that the measures it considered were adequately demonstrated based on “characteristics [that] are unique to the utility power sector” (J.A.805-806), including the fungibility of electricity on the grid and the industry’s extensive experience with (and indeed preference for) trading schemes over technologies like carbon capture that would be “substantially more expensive or substantially less effective at reducing emissions.” (J.A.733.) Because these characteristics are not the same across pollutants and industries, there is no basis for petitioners’ concern that the Clean Power Plan’s approach would necessarily be “adequately demonstrated” for non-greenhouse-gas pollutants, or for non-utility sectors such as factories, homes, or hospitals (W.Va. Br. 19; Westmoreland Br. 28; NACCO Br. 25-26).<sup>14</sup>

Section 7411(a)(1) also identifies three specific factors that EPA must consider in determining the best

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<sup>14</sup> Confirming this point, two months ago EPA issued proposed rules under Section 7411 to limit emissions of methane—another greenhouse gas—from new and existing oil and gas facilities. *See* Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110 (Nov. 15, 2021). Reflecting the differences between the electric grid and oil and gas production, EPA determined that the best system of emission reduction included technologies and measures that are implemented at the level of each individual source, without coordination with other sources. *See id.* at 63,121-22, tbl. 3.

system: the cost of achieving emission reductions, nonair quality health and environmental impacts, and energy requirements. EPA has interpreted these provisions to require consideration of cost and energy requirements both on an individual source level and on the sector level (J.A.808), and to preclude EPA from imposing “unreasonable technological or financial burdens on industry” (J.A.140). Petitioners suggest that these factors would not meaningfully limit EPA’s discretion (*e.g.*, W.Va. Br. 19), but that argument is pure speculation: the court below said nothing that would diminish the importance of these factors, and this Court has previously recognized that cost considerations can constrain EPA’s regulatory decision-making, *see Michigan v. EPA*, 576 U.S. 743, 753 (2015).

Finally, the Act authorizes courts to set aside any Section 7411 regulation that is arbitrary and capricious, or that is an abuse of EPA’s discretion. *See* 42 U.S.C. § 7607(b)(1), (d)(9)(A). Arbitrary-and-capricious review following promulgation of a specific rule and based on a complete rulemaking record provides the appropriate mechanism for testing whether EPA has appropriately considered factors such as cost or energy needs, or impacts such as the impairment of the electric grid’s reliability. *See In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). Such review would also provide the appropriate forum for petitioners’ concerns (W.Va. Br. 8; Westmoreland Br. 14) that EPA may regulate based on hidden, pretextual reasons outside of its statutory authority—*e.g.*, to shut down an industry rather than to reduce emissions. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

2. Petitioners also err in assuming that the decision below endorsed the Clean Power Plan in its entirety and the measures that it adopted to reduce power-plant

CO<sub>2</sub> emissions. The court of appeals did no such thing. It was reviewing not the Clean Power Plan itself, but the ACE Rule’s repeal of that earlier regulation. And because judicial review of agency action is limited to “the grounds invoked by the agency,” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), the court considered only whether the Rule’s particular interpretation of “best system of emission reduction”—the sole basis for the Rule’s repeal of the Plan—was compelled by the statute (J.A.102).

The court did not consider (because the ACE Rule itself did not determine) whether any of the other statutory constraints identified above might provide a basis for repealing the Clean Power Plan. And the court did not pass on the validity of other features of the Clean Power Plan that made it unique compared to prior power-plant or Section 7411(d) regulations. For example, as some petitioners point out (NACCO Br. 8), the Clean Power Plan was distinct in basing its best system in part on increased generation from nonemitting facilities, like renewables, that are not regulated under Section 7411, rather than limiting its scope to sources within EPA’s regulatory jurisdiction. (J.A.657, 666-671.) In accordance with that choice, the Plan set the stringency of its emission guidelines based in part on “modeling projections” about the construction of *new* renewable facilities—including “additional deployment that would be motivated” by the Plan’s emission standards (J.A.953)—rather than basing stringency solely on the operations of existing sources. (J.A.946, 953-958.)

These features of the Plan are the appropriate targets of petitioners’ repeated complaints that the Plan would have required sources to “subsidize competitors in the renewable-energy industry” (W.Va.

Br. 1) or compelled “States to shift from fossil fuel-fired plants to new renewable resources” (Nat’l Mining Ass’n Br. 43). But the court of appeals did not consider or endorse these features of the Plan. Instead, it simply rejected the ACE Rule’s broad conclusion that EPA could not consider *any* measures that went beyond a single source standing alone—including measures that would have been limited to regulated industries, to existing sources, or even to each individual operator’s own portfolio of power plants. Nothing in the court’s rejection of the Rule’s statutory interpretation would preclude a future court from considering in the first instance whether these other features are consistent with EPA’s statutory authority, assuming that they are part of a future rule.

## **II. This Case Does Not Present Concerns About Major Questions or Non-Delegation.**

### **A. EPA’s Consideration of Measures Beyond Those That Can Be Implemented “To and At” a Particular Source Does Not Implicate Any Major Question.**

1. Petitioners claim that EPA’s selection of the best system of emission reduction in a future regulation would “sidestep[] Congress to decide major questions . . . that Congress ought to be the one to decide.” (Westmoreland Br. 2.) But this argument ignores the fact that Congress has already expressed its position on “each critical element of the Agency’s regulatory authority” relevant to this case. (J.A.136.) Congress defined “air pollutant” in the Act in a manner that encompassed CO<sub>2</sub> emissions. *Massachusetts*, 549 U.S. at 528-29. Congress empowered EPA to regulate “greenhouse gas emissions from fossil-fuel fired powerplants”

specifically. *AEP*, 564 U.S. at 425. And “Congress delegated to EPA the decision whether *and how* to regulate carbon-dioxide emissions from powerplants.” *Id.* at 426 (emphasis added).

The Act also contains “clear Congressional authorization,” *UARG*, 573 U.S. at 324, regarding who should make the specific regulatory determination at issue here: the selection of the best system of emission reduction. Congress provided that the best system is one that “*the Administrator determines has been adequately demonstrated.*” § 7411(a)(1) (emphasis added). It chose to provide specific criteria for EPA to consider in deciding on the best system, including cost, effectiveness, and energy requirements. See *supra* at 35-36. And, for existing sources, Congress carved out an important role for the States to issue source-specific performance standards under EPA’s guidelines. § 7411(d)(1). Through these provisions, Congress made clear that it was not reserving for itself the complex and technical question of how best to reduce emissions of a particular pollutant from a particular sector, but rather was “entrust[ing] such complex balancing to EPA in the first instance, in combination with state regulators,” *AEP*, 564 U.S. at 427.

This case thus does not resemble those in which a federal agency has acted outside of its assigned lane to make decisions of “vast economic and political significance,” *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation marks omitted), without any statutory basis to believe that Congress intended to delegate such decision-making authority to it. In each of these cases, this Court found that the agency had committed a category error in deeming itself to have authority to regulate in a particular area at all—such as the FDA’s assertion of

jurisdiction over tobacco, a substance that it had never sought to regulate before, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); the Centers for Disease Control and Prevention’s attempt to directly regulate “the landlord-tenant relationship,” a domain outside its statutory authority to “prevent[] the interstate spread of disease by identifying, isolating, and destroying the disease itself,” *Alabama Ass’n of Realtors*, 141 S. Ct. at 2488-89; or the Occupational Safety and Health Administration’s recent attempt to issue “a general public health measure” rather than one tied more closely to the agency’s express authority to regulate “‘occupational’ hazards and the safety and health of ‘employees,’” *National Fed’n of Indep. Bus. v. Department of Labor, OSHA*, No. 21A244, 2022 WL 120952, at \*3 (U.S. Jan. 13, 2022) (per curiam) (*NFIB*).

In these cases, the Court determined that the agencies had made an error of kind, not just degree, because they had strayed outside of the core regulatory functions that Congress had assigned to them. This Court thus did not rely solely on the impact of the rule in question, but rather identified specific statutory lines that Congress had drawn but the agencies had disregarded. *See, e.g., id.* at \*3-4 (describing “the text of the agency’s Organic Act”); *UARG*, 573 U.S. at 325 (rejecting EPA’s decision to “rewrit[e] unambiguous statutory terms”); *Brown & Williamson*, 529 U.S. at 141 (FDA’s regulation of tobacco would be “incompatible with” other provisions). And this Court found that the agencies, by exceeding their regulatory roles, had removed an essential predicate for both congressional delegation and judicial deference to agency action: namely, the presumption that the agency is acting in a field where it has unique experience and expertise that

neither Congress nor the judiciary shares. *See NFIB*, 2022 WL 120952, *id.* at \*3 (noting that OSHA had acted outside its “sphere of expertise”); *cf. Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (noting “Attorney General’s lack of expertise in this area”). The agencies were thus not just acting outside of their statutory authority, but doing so in ways that this Court found undermined the premise for delegating authority to them in the first instance.

Here, by contrast, there is no dispute that Congress has made the choice of what EPA may regulate (CO<sub>2</sub> emissions), whom it may regulate (existing power plants), and how it should do so (partnering with the States to establish performance standards based on EPA’s determination of the best system of emission reduction). There is also no dispute that EPA has experience and expertise in studying the harms of greenhouse-gas pollution and evaluating the best means of reducing that pollution from stationary sources. *See AEP*, 564 U.S. at 428-29. And far from being an “ancillary” or “marginal” provision (W.Va. Br. i; NACCO Br. 1), Section 7411(d) is the “most relevant” provision of a statute that “speaks directly” to regulating CO<sub>2</sub> emissions from existing power plants. *AEP*, 564 U.S. at 424. Congress, not EPA, has thus made the major policy choices here.

2. Petitioners thus cannot credibly argue that EPA decides a major question outside of its delegated authority whenever it regulates CO<sub>2</sub> emissions from existing power plants or determines the best system of emission reduction for such sources. And their concern that EPA might go too far in the future and resolve “major questions” by issuing a “transformative” rule (Westmoreland Br. 26; *see also* W.Va. Br. 19; NACCO Br. 25-26) improperly depends on speculation about

“contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam) (quotation marks omitted).

Petitioners’ concerns are necessarily speculative because, as the United States and NGO Respondents point out (NGO Resp. Br. 23-32), no extant EPA rule concretely affects them: EPA has already announced that it will not implement the Clean Power Plan (see *supra* at 14-15), and it is in the process of promulgating a new rule in place of the vacated ACE Rule. There is thus no EPA rule on the books that this Court can consider to evaluate petitioners’ claims about practical impacts on States and the power sector. But the details matter when it comes to assessing whether a rule exceeds an agency’s authority. This Court recently confirmed as much when it stayed a broad COVID-19 rule issued by OSHA but acknowledged that narrower, “targeted regulations” would be “plainly permissible.” *NFIB*, 2022 WL 120952, at \*4. Thus, until EPA completes its current rulemaking, it is entirely speculative whether EPA will rely on “outside the fenceline” measures at all—let alone in the particular way that the Clean Power Plan did—or what the impact of its selected measures may be on States and sources. (W.Va. Br. 24-25.) It is also uncertain how EPA (or a reviewing court) will apply the statutory constraints discussed above (see Point I.C), including the requirement that the best system of emission reduction be “adequately demonstrated” and the mandate that EPA consider costs and “our Nation’s energy needs,” *AEP*, 564 U.S. at 427—constraints that would directly bear on the impact of any Section 7411 rule. Given these uncertainties, petitioners’ demand that this Court prejudge hypothetical exercises of EPA’s rulemaking

authority seeks an advisory ruling of the type that this Court has steadfastly refused to issue. *See Carney v. Adams*, 141 S. Ct. 493, 498 (2020).

Perhaps to avoid this problem, petitioners appear to assume that *any* power-plant regulation under Section 7411(d) that goes beyond measures that can be implemented “to and at” a single source will necessarily have “vast economic and political significance,” *UARG*, 573 U.S. at 324 (quotation marks omitted). (*See, e.g.*, *Westmoreland Br. 26*.) This assumption is unfounded, as actual industry experience since the promulgation of the Clean Power Plan confirms. Petitioners predicted in 2016 filings to this Court that the Plan would inflict “massive” economic harm if allowed to go into effect. *See Applicants’ Reply in Support of Application for Immediate Stay* at 28, *West Virginia v. EPA* (Feb. 9, 2016). But petitioners have been proven wrong. By 2019, industry-led trends toward low- and zero-emitting energy turned out to be so significant that, even without the Clean Power Plan ever having come into effect, the ACE Rule found that “there is likely to be no difference between a world where the Clean Power Plan is implemented and one where it is not.” (J.A.1672-1673.)

In other words, the approach that the Clean Power Plan adopted—and that petitioners so heavily criticize here—would not have had the extreme effects on States and industry that petitioners predicted. This experience rebuts petitioners’ assumption that dire impacts—or major questions—are necessarily implicated by EPA’s consideration of emission-reduction measures that are not implemented “to and at” individual sources. Claims of impact should be based on an actual rule and a concrete record, rather than on speculative concerns about what EPA *might* do in a future rulemaking.

*Cf. Department of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 69 (1994) (refusing to address argument premised “on consequences that, while possible, are by no means predictable”).

Some petitioners also argue that the Clean Power Plan’s approach to emission reduction was flawed not solely because of the sheer magnitude of its potential impact, but also because it amounted to a form of energy regulation that is automatically beyond EPA’s purview. (Westmoreland Br. 5; W.Va. Br. 1.) Again, it is pure speculation to assume that EPA’s forthcoming rulemaking will follow the Clean Power Plan or be subject to a similar characterization. But petitioners’ arguments also wrongly assume that Congress intended to forbid EPA from controlling pollution in a manner that would have any significant impact on energy generation. To the contrary, because the power sector is well understood to play a significant role in creating pollution, Congress was fully aware that EPA would have to take energy into account in designing its emission regulations. For that reason, Section 7411(a)(1) expressly requires EPA to consider “energy requirements” in determining the best system of emission reduction, and this Court observed that Congress intended for the agency to consider “our Nation’s energy needs” in issuing emission guidelines under Section 7411(d), *AEP*, 564 U.S. at 427. EPA does not impermissibly decide “a forbidden major question when [it] regulates as it was told to do.” (J.A.153.) Indeed, it would be difficult or even impossible for EPA to require meaningful pollution reductions from power plants if its regulations could not in any way influence the manner in which electricity is generated.

More broadly, petitioners’ view that EPA presumptively exceeds its authority whenever it issues signifi-

cant rules under Section 7411 disregards express indications that Congress chose to have EPA consider the costs of its regulations in the first instance, based on “scientific, economic, and technological resources [that] an agency can utilize,” but that neither Congress nor the courts can easily marshal. *AEP*, 564 U.S. at 428. In Section 7411(a)(1), Congress instructed EPA to determine the “best system of emission reduction” by, among other things, “taking into account the cost of achieving such reduction,” including both environmental and nonenvironmental impacts. Moreover, as this Court has observed, Congress vested EPA with authority to regulate power-plant CO<sub>2</sub> emissions because the agency was best suited to evaluate what approaches to emission reduction would be “practical, feasible and economically viable.” *AEP*, 564 U.S. at 428-29. The impact of a Section 7411 rule was thus a factor that Congress wanted EPA to consider in the exercise of its delegated expertise—not an independent, threshold barrier to rulemaking in the first instance.

3. State Petitioners’ related argument that Congress has not provided a “clear statement” authorizing EPA to alter the traditional federal-state balance (W.Va. Br. 26-31) likewise provides no basis to reverse the court of appeals’ decision. Again, that argument is not properly presented because it is premature and based on speculation about what EPA might do in a future rulemaking. Under the status quo, there is no EPA rule that has affected the federal-state balance at all, let alone in a way that would require a “clear statement” from Congress.

In any event, as discussed (see *supra* at 29-33), State Petitioners are wrong to characterize the decision below as disturbing Section 7411’s cooperative-federalism scheme. The decision below faithfully

followed this Court's past descriptions of the multistep federal-state process in both *AEP* and its predecessors. And this Court's cases have recognized that Congress has spoken clearly—both in Section 7411 and in the analogous cooperative-federalism regime in Section 7410—by giving EPA the authority to determine “the appropriate amount” of CO<sub>2</sub> regulation and to decide “how” to limit CO<sub>2</sub> emissions to address climate change, while reserving for the States the authority to issue source-specific performance standards consistent with federal guidelines. *See AEP*, 564 U.S. at 426-27; *Train*, 421 U.S. at 79-80.

North Dakota is mistaken in arguing (N.D. Br. 40-47) that the court of appeals' decision is inconsistent with *Alaska*, 540 U.S. 461. The statutory provision at issue in *Alaska* explicitly provided that it was up to the state permitting authority to determine the best available control technology (BACT) that is “achievable” on “a case-by-case basis.” 42 U.S.C. § 7479(3). Section 7411, by contrast, tasks EPA in the first instance with determining the best system of emission reduction that it determines has been adequately demonstrated for a source category. *Id.* § 7411(a)(1). Moreover, notwithstanding the clear primacy of States in determining BACT under Section 7479, this Court rejected the argument made by Alaska—and echoed by North Dakota here—that the State “alone” made the BACT determination. 540 U.S. at 488-89. To the contrary, Section 7479 preserved a “vital role” for EPA to provide “meaningful . . . oversight” regarding state determinations. *Id.* at 489, 491. This Court specifically recognized that “an EPA surveillance role” was essential to prevent both cross-border air pollution and “economic-environmental blackmail” in which regulated industries favor states with “more permissive” air-quality

regulation. *Id.* at 486 (quoting H.R. Rep. No. 95-294, at 134 (1977)). These concerns likewise apply to state efforts to control greenhouse gas emissions from power plants, including those that emanate from sources in other States. (J.A.568-569.)

Finally, petitioners are incorrect that EPA is barred from taking the nature of the power grid into account on the ground that regulating electrical generation is a traditional state role. (W.Va. Br. 27.) “[V]irtually any action” a federal agency takes with respect to the power sector may affect electricity generation, but “[t]hat is of no legal consequence” provided that the agency is regulating in its proper sphere. *FERC v. Electric Power Supply Ass’n*, 577 U.S. 260, 281 (2016). A federal agency is not restrained from regulating in an area where it has express delegated authority simply because the consequences of its regulation may affect areas of traditional state control. *Id.* at 279-81. And this Court has made clear that Section 7411(d) delegates to EPA, in combination with the States, the authority to regulate CO<sub>2</sub> emissions from the power sector, despite the inevitable effects of such pollution regulation on electricity generation. *AEP*, 564 U.S. at 424. There is no indication that Congress intended to undercut its own objectives by allowing the inherent relationship between pollution and electricity generation to disable EPA’s regulatory authority.

#### **B. Section 7411 Does Not Raise Non-Delegation Concerns.**

Finally, some petitioners suggest (W.Va. Br. 44-49; Westmoreland Br. 41-44) that the court of appeals’ interpretation of Section 7411 would make that statute an impermissible delegation of legislative authority to

EPA. This non-delegation argument rests on the illogical claim that the court of appeals' rejection of one atextual limitation on EPA somehow freed the agency from all textual constraints on its determination of the best system of emission reduction. The decision below threatens no such slippery slope. Instead, as discussed (see *supra* at 33-38), the court of appeals expressly recognized the multiple other statutory criteria in Section 7411(a)(1) that guide EPA's determination. (J.A.145.) These criteria "meaningfully constrain[]" the [EPA's] discretion and thus remove any non-delegation concerns. See *Touby v. United States*, 500 U.S. 160, 166 (1991).

Petitioners dismiss the limitations in Section 7411(a)(1) as ineffectual (Westmoreland Br. 42-43), but they ignore the fact that EPA has in fact relied on those limitations to reject certain emission-reduction strategies, including in the Clean Power Plan itself (e.g., J.A.733-735). And the constraints in Section 7411(a)(1) (including the "adequately demonstrated" requirement and the need to consider costs, health and environmental impact, and energy requirements) are no less directive than the language in Section 7409(b)(1) ("requisite to protect the public health") that this Court upheld against a non-delegation challenge in *Whitman v. American Trucking Associations*, 531 U.S. 457, 473, 475-76 (2001). In Section 7411, as in Section 7409, "Congress has supplied an intelligible principle to guide [EPA's] use of discretion," *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.).

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

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**Nos. 20-1530, 20-1531, 20-1778, and 20-1780**

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**In the Supreme Court of the United States**

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STATE OF WEST VIRGINIA, ET AL., PETITIONERS

*v.*

U.S. ENVIRONMENTAL PROTECTION AGENCY AND  
MICHAEL REGAN, ADMINISTRATOR OF THE U.S.  
ENVIRONMENTAL PROTECTION AGENCY.

---

THE NORTH AMERICAN COAL CORPORATION, PETITIONER

*v.*

U.S. ENVIRONMENTAL PROTECTION AGENCY AND  
MICHAEL REGAN, ADMINISTRATOR OF THE U.S.  
ENVIRONMENTAL PROTECTION AGENCY.

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ON WRITS OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF FOR THE  
POWER COMPANY RESPONDENTS**

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Additional Captions Listed on Inside Cover

WESTMORELAND MINING HOLDINGS LLC, PETITIONER

*v.*

U.S. ENVIRONMENTAL PROTECTION AGENCY AND  
MICHAEL REGAN, ADMINISTRATOR OF THE U.S.  
ENVIRONMENTAL PROTECTION AGENCY.

---

NORTH DAKOTA, PETITIONER

*v.*

U.S. ENVIRONMENTAL PROTECTION AGENCY AND  
MICHAEL REGAN, ADMINISTRATOR OF THE U.S.  
ENVIRONMENTAL PROTECTION AGENCY.

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**QUESTION PRESENTED**

Whether the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, unambiguously restricts the Environmental Protection Agency to considering only measures that can be applied “at and to” individual power plants, when EPA determines the “best system of emission reduction [BSER],” § 7411(a)(1), that has been adequately demonstrated for reducing carbon dioxide from the listed existing stationary source category of fossil fuel-fired power plants (which must be reflected in the relevant standards of performance developed by States, § 7411(d)).

## AMENDED CORPORATE DISCLOSURE STATEMENTS

Pursuant to this Court's Rule 29.6, Power Company Respondents—Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, and Sacramento Municipal Utility District—provide the following disclosure statements.

**Consolidated Edison, Inc.** states that it is a holding company that has outstanding shares and debt held by the public and may issue additional securities to the public. It has no parent corporation and no publicly held company owns 10 percent or more of its stock.

**Exelon Corporation** states that it is a holding company. It has no parent corporation and no publicly held company owns 10 percent or more of its stock.

**National Grid USA** states that it is a holding company. All of the outstanding shares of common stock of National Grid North America Inc. are owned by National Grid (US) Partner 1 Limited. All of the outstanding ordinary shares of National Grid (US) Partner 1 Limited are owned by National Grid (US) Investments 4 Limited. All of the outstanding ordinary shares of National Grid (US) Investments 4 Limited are owned by National Grid (US) Holdings Limited. All of the outstanding ordinary shares of National Grid (US) Holdings Limited are owned by National Grid plc. National Grid plc is a public limited company organized under the laws of England and Wales. No publicly held corporation directly owns

10 percent or more of National Grid plc's outstanding ordinary shares.

**New York Power Authority** states that it is a New York State public-benefit corporation. It has no parent corporation and no publicly held company owns 10 percent or more of its stock.

**Sacramento Municipal Utility District** states that it is a community-owned, not-for-profit electric service provider, has no parent corporation and no publicly held company owns 10 percent or more of its stock.

**Power Companies Climate Coalition** states that it is an unincorporated association of companies engaged in the generation and distribution of electricity and natural gas. Its members include, in addition to each of the foregoing Respondents, the following entities:

**Los Angeles Department of Water and Power** states that it is a vertically integrated publicly owned electric utility of the City of Los Angeles.

**Pacific Gas and Electric Company** states that it is a public utility incorporated in the state of California and a wholly owned subsidiary of PG&E Corporation. No publicly held corporation directly owns more than 10 percent of PG&E Corporation's shares.

**Puget Sound Energy, Inc.** states that it is a public utility incorporated in the State of Washington. All of the outstanding shares of voting stock of Puget Sound Energy, Inc. are held by Puget Energy, Inc. All

of the outstanding shares of voting stock of Puget Energy, Inc. are held by Puget Equico, LLC, an indirect wholly-owned subsidiary of Puget Holdings LLC. No publicly held corporation directly owns more than 10 percent of Puget Holdings LLC.

**Seattle City Light** states that it is a public utility providing electricity to Seattle, Washington, and parts of its metropolitan area and is a department of the City of Seattle.

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40 C.F.R. § 60.27(b) .....	13
40 C.F.R. § 60.27a(b) .....	13
Air Pollution Prevention & Control: List of Categories of Stationary Sources, 36 Fed. Reg. 5,931 (Mar. 31, 1971).....	10
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National Emission Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial- Institutional, and Small Industrial- Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304 (Feb. 16, 2012).....	35
Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emis- sions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (“ACE Rule”) (reproduced in Joint Appendix at JA1725-2030) .....	<i>passim</i>
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--	----

## Other Materials

EPA, 2020 Greenhouse Gas Emissions from Large Facilities, <a href="https://www.epa.gov/ghgreporting">https://www.epa.gov/ ghgreporting</a> (Aug. 7, 2020).....	10
EPA, NAAQS Table, <a href="https://www.epa.gov/criteria-air-pollutants/naaqs-table">https://www.epa.gov/ criteria-air-pollutants/naaqs-table</a> (last visited Jan. 14, 2022).....	8
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Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis (2021).....	9
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U.S. Energy Info. Admin., FAQs: What is U.S. electricity generation by energy source? (last updated Nov. 2, 2021), <a href="https://www.eia.gov/tools/faqs/faq.php?id=427&amp;t=3">https://www.eia.gov/tools/faqs/faq.php?id =427&amp;t=3</a> .....	10
U.S. Global Change Res. Prog., Fourth Na- tional Climate Assessment (2017).....	9

## INTRODUCTION

Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), creates a framework under which the Environmental Protection Agency (“EPA”) and States work together to limit emissions of greenhouse gases and certain other air pollutants emitted by categories of existing stationary sources listed by EPA, including fossil fuel-fired power plants.

Under that framework, States are responsible for “establish[ing] standards of performance for any existing source” for such pollutants and “provid[ing] for the implementation and enforcement of such standards.” 42 U.S.C. § 7411(d)(1). Those standards must “reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction [“BSER”] which,” taking into account cost and other factors, EPA “determines has been adequately demonstrated.” § 7411(a)(1). EPA may establish standards of performance if a State fails to submit a satisfactory plan or to enforce its plan. § 7411(d)(2).

In 2019, EPA promulgated the Affordable Clean Energy (“ACE”) Rule.<sup>1</sup> The ACE Rule repealed a prior rule issued in 2015, the Clean Power Plan (“CPP”) Rule, which was stayed by this Court and never went

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<sup>1</sup> Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (JA1725).

into effect.<sup>2</sup> The CPP Rule would have prescribed guidelines for carbon dioxide emissions for the source category of fossil fuel-fired power plants.

The ACE Rule's repeal of the CPP Rule was not attributed to a shift in policy or to revised scientific or technical judgment, but instead relied on the view that EPA was legally compelled to withdraw the CPP Rule. JA1746. The CPP Rule had identified the "best system of emission reduction [BSER]" for fossil fuel-fired power plants as encompassing emissions trading and other strategies that incentivize power producers to scale up generation by cleaner natural gas-fired and renewable sources, while reducing generation from more carbon-intensive sources. The ACE Rule concluded, however, that the statutory text of the Clean Air Act unambiguously prohibits EPA from considering such means as part of the BSER for the source category because it viewed the statute to limit the BSER to considering only technologies and techniques that can be implemented *at* and *to* each individual source. Indeed, the ACE Rule went further, prohibiting States themselves from allowing producers and utilities such as the Power Company Respondents the flexibility even to *comply with* standards of performance by obtaining emissions credits or taking other actions not confined to measures "at and to" an individual source. JA1893.

The Power Company Respondents here include several of the nation's largest public and private

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<sup>2</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (JA273).

power companies. They collectively own or operate nearly 75,000 megawatts of electric generating-capacity from coal, oil, natural gas, nuclear, wind, solar, hydropower, geothermal and biofuel resources. They have operations in 49 States and the District of Columbia, and collectively provide electricity service to more than 20 million homes and businesses, amounting to a total service population of more than 40 million. The Power Company Respondents petitioned for judicial review of the ACE Rule in the U.S. Court of Appeals for the D.C. Circuit.

The court of appeals held that EPA erred in concluding that the Clean Air Act unambiguously limits the agency's determination of the BSER to only measures that can be installed "at and to" each individual power plant. None of the seven merits briefs for or supporting Petitioners identifies any statutory text that could clearly limit the BSER to such source-specific measures. And for good reason—the statutory text and structure do not support such a limitation. To the contrary, the language of Sections 7411(a) and 7411(d) contrasts sharply with neighboring provisions of the Clean Air Act—notably, with Section 7412, which regulates stationary-source emissions of certain air pollutants listed as "hazardous"—that have long been understood to require source-specific measures. The language here also contrasts sharply with other provisions of Section 7411 that specify that, in circumstances not applicable here, EPA may prescribe a standard reflecting the "best *technological* system of continuous emission reduction" § 7411(h)(i) (emphasis added). An "at and to" limitation also would undermine the Act's purpose and fail to reflect the reality of what systems of emission reduction are

“adequately demonstrated” in the market for electric power. Electricity producers do not operate in isolation, but regularly work together with grid operators to satisfy real-time consumer demand at the lowest cost, shifting between producers at different times.

These cases do not require the Court to opine on the legality of the CPP Rule or to demarcate the outer bounds of EPA’s authority under Section 7411(d)—questions on which the Power Company Respondents take no position. EPA does not challenge the judgment below, and has indicated that it does not intend to implement the CPP Rule (which is, in any event, a nullity given the extent to which market participants already have achieved the emission reduction that Rule contemplated). The agency has not issued a new rule or other agency action embodying a particular view of the agency’s authority under Section 7411(d).

Indeed, there are, at a minimum, serious questions about whether appellate standing remains because of the lack of injury to Petitioners from the judgment below. Before it was repealed by the ACE Rule, the CPP Rule was stayed and did not go into effect, and there is no indication that it will be resurrected. The court of appeals’ vacatur of the ACE Rule and remand to the agency to reconsider its authority under Section 7411(d) did not ratify the CPP or require EPA to adopt any view of its authority that would injure Petitioners. Even if these cases remain justiciable, affirmance of the court of appeals’ judgment vacating the ACE Rule and remanding it to the EPA is appropriate because the Rule had relied on the erroneous view that the statute unambiguously limits the BSER to “at and to” measures. *See Negusie v. Holder*, 555 U.S. 511,

522-23 (2009); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Vacatur and remand is especially appropriate because the agency does not view the ACE Rule interpretation as accurate, and it is considering anew its responsibilities under Section 7411(d).

To affirm the judgment below, the Court need recognize only that Sections 7411(a) and 7411(d) do not *unambiguously* restrict the BSER to “at and to” measures at individual plants. The Power Company Respondents urge the Court to reject Petitioners’ request that the Court issue an advisory opinion about whether speculative abuses of power by an imagined future EPA Administrator would fall within the powers Congress lawfully granted to the agency.

## STATEMENT OF THE CASE

### A. Statutory Framework

Electrification transformed American life by powering factories, lighting and cooling homes, and enabling now-omnipresent electronic consumer appliances and entertainment devices. Generation of the power that fueled that transformation—along with the adoption of the automobile—also filled the country’s air with smog and other airborne pollutants.

In response to adverse public health and environmental consequences caused by these emissions, Congress adopted and has repeatedly strengthened the Clean Air Act “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1); *see also* Clean Air Act of 1963, Pub. L. 88-206, 77 Stat. 392; Air

Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485; Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685; Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399.

The Act, one of the pillars of American environmental law, created “a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution.” *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

The Clean Air Act provides for an interlocking set of programs for controlling emission of air pollutants through a range of regulatory authorities. Among other things, the Act addresses airborne concentrations of “criteria” pollutants in 42 U.S.C. §§ 7408-7409; emissions by mobile sources such as motor vehicles and airplanes, as well as fuels and additives, in §§ 7521-7590; and emissions by stationary sources of certain “hazardous air pollutants” in § 7412.

The statute also addresses emissions by certain listed categories of stationary sources (such as factories and power plants) in 42 U.S.C. § 7411, which is the provision at issue here. Section 7411 “ensure[s] that the Act achieves comprehensive pollution control by guaranteeing that there are ‘no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.’” JA119 (quoting S. Rep. No. 91-1196, at 20 (1970)).

Under Section 7411, EPA must publish a list of each category of stationary source that “causes, or

contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A). For each listed category of stationary source, Section 7411(b)(1)(B) requires EPA to prescribe federal “standards of performance” for *new* sources. The statute defines “standard of performance” as:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction [“BSER”] which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] determines has been adequately demonstrated.

§ 7411(a)(1).

For such new stationary sources, EPA may enforce such standards of performance or delegate its authority to a State that has developed and submitted an adequate procedure to implement and enforce the determined standards. § 7411(c)(1), (2).

For *existing* stationary sources, Section 7411(d) establishes a cooperative-federalism approach. It directs EPA to prescribe regulations for a “procedure similar to that provided by section 7410” (regarding ambient air quality standards) for States to submit plans for standards of performance for any existing

source for any air pollutant (other than “criteria” pollutants addressed under Sections 7408-7410<sup>3</sup> and “hazardous air pollutants” listed under Section 7412<sup>4</sup>). Under this framework, EPA issues emissions guidelines, 40 C.F.R. § 60.21(e), reflecting the emission reduction achievable for the particular category of stationary source through application of the BSE that the agency finds has “been adequately demonstrated,” 42 U.S.C. § 7411(a)(1). States then issue standards of performance for each stationary source within their jurisdiction and may, when applying those standards to particular sources, “take into consideration, among other factors, the remaining

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<sup>3</sup> In 42 U.S.C. § 7408(a), Congress provided for EPA and the States to cooperate in addressing concentrations in ambient air of “criteria” pollutants that “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” Section 7409 tasks EPA with prescribing a national ambient air quality standard (a “NAAQS”) for each of those “criteria” pollutants and vests States with primary responsibility for developing State Implementation Plans, or “SIPs,” for achieving the standards. §§ 7409(a), 7410(a); see *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976). EPA is charged with reviewing and if necessary revising the SIPs. 42 U.S.C. § 7410(c), (o). EPA has prescribed NAAQS for six “criteria” pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. EPA, NAAQS Table, <https://www.epa.gov/criteria-air-pollutants/naaqs-table> (last visited Jan. 14, 2022).

<sup>4</sup> Section 7412 requires EPA to identify “hazardous air pollutants”—pollutants that “present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects,” 42 U.S.C. § 7412(b)(2)—and specifically lists more than 180 such pollutants. Section 7412 further requires EPA to publish a list of “all categories and subcategories of major sources and area sources” of the listed hazardous air pollutants and “establish emission standards” for each. § 7412(c)(1), (2).

useful life of the existing source to which [the] standard applies.” § 7411(d)(1). EPA regulations must provide for implementation and enforcement of the standards of performance by the States. § 7411(d)(1)(B). If a State fails to submit a satisfactory plan or to enforce its plan for existing stationary sources, EPA may prescribe and enforce a federal plan for such State. § 7411(d)(2).

### **B. Factual Background**

Due in large part to human activities, notably the combustion of fossil fuels, atmospheric concentrations of greenhouse gases such as carbon dioxide and methane have increased at unprecedented rates, and are now higher than Earth has experienced in several million years. These particular gases are referred to as “greenhouse gases” because they trap heat in the atmosphere and warm the planet, akin to a greenhouse structure warming the air and plants within. EPA, Overview of Greenhouse Gases, <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> (last visited Jan. 14, 2022). An overwhelming scientific consensus recognizes that, as a result, global temperatures are rising at unprecedented rates. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 504-05 (2007); Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis at SPM-7 (2021); U.S. Global Change Res. Prog., Fourth National Climate Assessment 35-36 (2017).

Any effective approach for curtailing greenhouse-gas emissions requires curbing the volume of emissions produced by fossil fuel-fired power plants, such as coal-fired and gas-fired plants. These plants play a

significant role in powering American homes, businesses, factories, and infrastructure. They produce approximately 60 percent of the country's electric power, with nuclear and renewable energy sources responsible for the balance. U.S. Energy Info. Admin., FAQs: What is U.S. electricity generation by energy source? (last updated Nov. 2, 2021), <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3>.

Fossil fuel-fired power plants are “far and away the largest stationary source of greenhouse gases,” JA85, numbering 18 of the 20 largest single emitters of carbon dioxide in the country, EPA, 2020 Greenhouse Gas Emissions from Large Facilities, <https://www.epa.gov/ghgreporting> (Aug. 7, 2020). They are responsible for one-quarter of all greenhouse gases emitted in the United States. EPA, Sources of Greenhouse Gas Emissions <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Jan. 14, 2022). Fossil fuel-fired power plants have long been listed by EPA under Section 7411 as a category of stationary sources that cause, or contribute significantly to, air pollution. *See* Air Pollution Prevention & Control: List of Categories of Stationary Sources, 36 Fed. Reg. 5,931 (Mar. 31, 1971).

### **C. Procedural History**

#### **1. Regulation Under Section 7411 of Greenhouse Gases Emitted by Stationary Sources**

This Court held in *Massachusetts v. EPA* that greenhouse gases are “air pollutant[s]” for purposes of provisions of the Clean Air Act governing emissions

by motor vehicles. 549 U.S. at 528. EPA subsequently found that six greenhouse gases endanger public health and the public welfare.<sup>5</sup> This Court then concluded in *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (“*AEP*”), that greenhouse-gas emissions constitute statutory “air pollutant[s]” not only when emitted by motor vehicles, but also when emitted by stationary sources. 564 U.S. at 424-25. The Court concluded that it was “plain” that Section 7411 “speaks directly’ to the emissions of carbon dioxide from [power] plants.” *Id.* at 424.

## **2. Promulgation of the Clean Power Plan (“CPP”) Rule**

In October 2015, EPA established standards of performance for carbon dioxide emissions from *new* fossil fuel-fired power plants, as a category of “stationary sources” under 42 U.S.C. § 7411(b).<sup>6</sup> In that rulemaking, EPA determined, for example, that by deploying new technology (including for capturing and storing carbon dioxide), such power plants could, at reasonable cost, limit emissions to 1,400 lbs. of carbon dioxide per megawatt/hour. 80 Fed. Reg. at 64,512. EPA’s new-source rule took effect and is not at issue here.

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<sup>5</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

<sup>6</sup> Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,527, 64,529-31 (Oct. 23, 2015).

At the same time, EPA issued the Clean Power Plan (“CPP”) Rule, which would have provided carbon dioxide emission guidelines for State standards of performance for the category of *existing* fossil fuel-fired power plants. *See* JA273. EPA explained that the CPP Rule reflected the fact that carbon dioxide diffuses throughout the atmosphere and lingers for decades, and the fact that power plants are connected to a shared grid, such that “[g]eneration from one generating unit can be and routinely is substituted for generation from another generating unit in order to keep the complex machine [of the grid] operating while observing the machine’s technical, environmental, and other constraints and managing its costs.” JA567.

As part of the CPP Rule, EPA determined that the “best system of emission reduction [BSER] for carbon dioxide from the category of existing fossil fuel-fired electric generating units combines three features: “operational improvements and equipment upgrades that such plants may take to improve heat rate;” increasing lower-emitting natural-gas generation substituted for higher-emitting coal-fired steam plants; and increasing zero-emitting renewable generation substituted for fossil fuel-fired plants—all three of which were “consistent with current trends in the electricity sector.” JA491-92. EPA determined that if existing coal and gas plants were to use this best system involving these three features, they could, at reasonable cost, reduce by 2030 their carbon dioxide emissions to 1305 pounds and 771 pounds, respectively, per megawatt-hour. JA643.

EPA noted that the features underlying its BSER are “available to all affected” units through direct investment, operational shifts, or emissions trading, but that also “there are numerous *other* measures available to reduce CO2 emissions from affected” units. The EPA specified that its “determination of the BSER does *not* necessitate the use of the three building blocks to their maximum extent, or even at all.” JA299-300 (emphasis added).

The CPP Rule never took effect because this Court stayed its implementation pending the D.C. Circuit’s review. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). The D.C. Circuit held the litigation in abeyance while the agency reconsidered its position, then dismissed the petitions as moot in light of the agency’s repeal in 2019 of the CPP Rule. JA88.

### **3. Promulgation of the Affordable Clean Energy (“ACE”) Rule**

At the same time that the agency repealed the CPP Rule, the agency issued a new BSER for carbon dioxide from the category of existing fossil fuel-fired electricity generating units, and promulgated both agency actions through the Affordable Clean Energy (“ACE”) Rule. *See* JA1725.<sup>7</sup>

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<sup>7</sup> The ACE Rule also amended Section 7411(d)’s implementing regulations to delay significantly the time before existing sources became subject to new emissions controls. *E.g.*, JA1936; *compare* 40 C.F.R. § 60.23(a)(1), *with* § 60.23a(a)(1), *and* § 60.27(b), *with* § 60.27a(b). The D.C. Circuit concluded that this aspect of the ACE Rule was arbitrary and capricious, JA72, a conclusion that Petitioners have not challenged in this Court.

The ACE Rule based its repeal of the CPP Rule solely on its reading of the Clean Air Act as forbidding the CPP Rule. The ACE Rule read Section 7411 to “unambiguously limit[] the [BSER] to those systems that can be put into operation at a building, structure, facility, or installation,” such as “add-on controls” and “inherently lower emitting processes/practices/designs.” JA1746. Because the CPP Rule had contemplated the use of generation-shifting measures that in the agency’s view could not be implemented at specific sources, the ACE Rule concluded that it was “obliged to repeal the [CPP Rule] to avoid acting unlawfully.” JA1786.

The ACE Rule’s new BSER for carbon dioxide from coal-fired power plants<sup>8</sup> included seven different “technologies and techniques” for achieving minor increases in the efficiency with which such plants convert coal into electric power. JA1803-07 & tbl. 1. The Rule found that each of these technologies and techniques “c[ould] be applied *at and to* certain existing coal-fired [power plants].” JA1787 (emphasis added). Although the ACE Rule instructed States to “utilize” these efficiency ranges in preparing standards of performance, it expressly authorized States to submit standards of performance more lenient than these ranges. JA1807 tbl. 1.

The ACE Rule excluded from consideration in the determination of the BSER other means of reducing emissions. For example, the agency rejected co-firing

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<sup>8</sup> The ACE Rule declined to identify any BSER for gas-fired plants. JA1791.

biofuels, which can be carbon-neutral because it releases carbon that was trapped when the biofuels were grown, rather than carbon from subterranean fossil-fuel sources. The ACE Rule determined that would reduce emissions generally, but not at the level of specific power plants. JA1849-53. And the Rule rejected co-firing gas along with coal. The Rule opined that such an approach was not already in widespread use and was not, in the agency's view, "adequately demonstrated." JA1840-44. And the Rule rejected carbon capture and storage technology because, among other things, it deemed the technology too expensive for use at existing sources. JA1853-65.

The ACE Rule extended its narrow reading of the statute to restrict the means that States in their own plans can allow power plants to use to meet standards of performance. The Rule did not express a view as to whether States could allow power plants to meet standards through gas co-firing or carbon capture and storage. JA1893. It forbade States, however, from allowing power plants to meet the standards through emissions trading or through biofuel co-firing. JA1895-1904.

#### **4. Lower Court Proceedings**

Several petitions for judicial review of the ACE Rule were filed in the D.C. Circuit, including by the Power Company Respondents, numerous States, and various environmental groups, as well as by the coal industry, on various grounds. The court of appeals consolidated the petitions and ultimately vacated the ACE Rule. JA213-15.

The court of appeals ruled that the ACE Rule could not stand because it “rested critically on a mistaken reading of the Clean Air Act.” JA215. Nothing in the text, structure, history, or purpose of the Act plainly or unambiguously restricts the EPA to considering only measures that can be imposed “at and to” individual plants when the agency determines the BSER for carbon dioxide that has been adequately demonstrated for the category of existing fossil fuel-fired power plants. *E.g.*, JA104. The court of appeals recognized that EPA has “ample discretion” to identify BSERs for purposes of Section 7411, but rejected EPA’s attempt to “shirk its responsibility by imagining new limitations that the plain language of the statute does not clearly require.” JA118. The court of appeals also rejected, as ungrounded in Section 7411, the ACE Rule’s attempt to restrict States, in devising standards of performance and identifying means for power plants to comply with State implementation plans, to allowing plants to use only measures applied “at and to” individual sources.

EPA filed an unopposed motion with the court of appeals to withhold issuance of the mandate with respect to the court’s vacatur of the repeal of the CPP Rule. The court granted that motion, meaning that the CPP Rule did not go into effect. JA270-72. Accordingly, neither the now-vacated ACE Rule nor the CPP Rule is in effect.

Two coal-mining companies (Nos. 20-1531 and 20-1778) and numerous States (Nos. 20-1530 and 20-1780) petitioned for writs of certiorari. The Court granted the petitions, except insofar as Petitioner Westmoreland Mining Holdings LLC contested

whether coal-fired power plants are subject to regulation under Section 7411.

### SUMMARY OF ARGUMENT

I. The major questions doctrine is inapposite to these cases because there is no agency action in effect, or proposed to go into effect, that presents to the Court a statutory interpretation that raises any separation of powers concerns.

Application of the major questions doctrine in such circumstances would expand the doctrine far beyond this Court's precedents. Instead of reviewing an existing agency interpretation, it would require federal courts to issue advisory opinions about the most farfetched way an agency might try to misuse a particular statutory interpretation that it might adopt. Indeed, the Affordable Clean Energy ("ACE") Rule that was vacated by the judgment below was based on an agency interpretation that the statute unambiguously *limits* the agency's authority. The court of appeals rejected the agency's reading and remanded to the agency for further consideration without ratifying any expansive agency authority to make decisions of vast economic and political significance.

The provisions of the Clean Air Act at issue here, 42 U.S.C. § 7411(a) and § 7411(d), do not, on their face, raise separation of powers concerns implicating the major questions doctrine. They expressly authorize the EPA to set the "best system of emission reduction" (BSER)—a determination for which the agency has extensive expertise. The BSER is then to be reflected in standards of performance developed by the States.

And States retain broad authority and flexibility under Section 7411(d) to regulate existing sources by establishing and enforcing the standards of performance, leaving the agency no room beyond what Congress explicitly authorized.

II. The court of appeals correctly held that the Clean Air Act does not require the ACE Rule's interpretation. The statute does not unambiguously require that EPA, in determining the BSER that has been adequately demonstrated for a particular source category, consider only measures that are applied "at and to" an individual source.

The plain language of Section 7411 places no such limitation on the means EPA may consider in determining the BSER. Section 7411(a)'s requirement that EPA determine the best "*system*" evinces no restriction to "at and to" measures. The ordinary meaning of "system" is not so limited, and neighboring provisions in Sections 7411(h) and 7412(d) confirm that Congress knew how to include more limiting provisions through language used there, which it did not use in Section 7411(a).

A limitation of the BSER to "at and to" measures would be at odds with the statute's textual requirement that EPA determine the BSER that has been "adequately demonstrated." The power sector is unique because its responsibility for delivering its service to the public—a constant supply of electricity—depends on all producers orchestrating their behavior to balance supply and demand on an instantaneous basis, given economic, environmental, and transmission constraints. Because of the uniquely

interconnected nature of the electricity grid, utilities, many States, and EPA have all recognized that the “best system of emission reduction” for the listed source category of fossil fuel-fired power plants includes the means used at a systemic level and is not restricted to measures “at and to” each individual plant operated in isolation from one another. The ACE Rule’s contrary reading also unduly restricts the ability of the States and power plants to meet standards of performance through cost-effective means long demonstrated for the category of fossil fuel-fired power plants.

III. Sections 7411(a) and 7411(d) do not violate the nondelegation doctrine. They detail and limit EPA’s authority over emissions by listed categories of existing stationary sources. Those restraints provide intelligible principles that render the statute constitutional under any formulation of the nondelegation doctrine. This Court need not adopt an artificially narrow construction of the statute to avoid hypothetical constitutional problems that could result from an implausibly broad construction that the court of appeals did not adopt and EPA is not asserting.

## ARGUMENT

### I. THE MAJOR QUESTIONS DOCTRINE IS INAPPOSITE IN THE CIRCUMSTANCES OF THESE CASES.

#### A. Application of the Doctrine Here Would Be Based on Speculation and Yield an Advisory Opinion Because There Is No Agency Action in Effect or Proposed to Go Into Effect That Adopts Any Purportedly Overbroad Statutory Interpretation.

Petitioners ask this Court to transform the major questions doctrine into a vehicle for federal courts to issue advisory opinions based on abstract speculation about what agencies might do in the future. Petitioners' approach would invite courts to opine on the most farfetched way an agency might try to misuse a particular statutory interpretation that it might adopt. It is a recipe for courts to get bogged down in abstruse hypothetical concerns, which, in these cases, might still be alleviated through agency action on the remand ordered by the judgment under review.

Indeed, the judgment under review presents the Court with only vacatur and remand of an agency action (the ACE Rule) because that action was based on an erroneous interpretation that the statute unambiguously *limits* the agency's authority in certain ways. The judgment did not ratify any expansive agency authority to make decisions of vast economic and political significance. The ruling does not present any ripe separation of powers concern.

**B. Application of the Doctrine Absent an Agency Action Claiming Overbroad Authority Would Depart from Precedent and Pose Administrability Problems.**

This Court applies the major questions doctrine only when it reviews an agency's interpretation of a statute that is reflected in a broad exercise of agency authority. *See King v. Burwell*, 576 U.S. 473, 485-86 (2015). The Court has thus held in a series of exceptional cases that Congress had not, through "vague terms or ancillary provisions," conferred on an agency the authority to "alter the fundamental details of a regulatory scheme." *Whitman v. Am. Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

Critically, in these cases the Court reviewed actual action taken by the respective agency that was challenged as in excess of the agency's claim of authority. For example, in *King*, the Court reviewed an Internal Revenue Service regulation authorizing availability of billions of dollars in tax credits on federal exchanges affecting health insurance under the Affordable Care Act. 576 U.S. at 485-86. In other cases, the Court similarly reviewed actual agency action that relied on the agency's claim of particular statutory authority. *See NFIB v. Dep't of Labor*, No. 21A244, 2022 WL 120952, at \*1, \*3 (U.S. Jan. 13, 2022) (per curiam) (reviewing Occupational Safety and Health Administration regulation mandating vaccination); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (reviewing Centers for Disease Control and Prevention regulation promulgating and extending Congress's eviction moratorium); *Util. Air Regul. Grp. v. EPA*, 573 U.S.

302, 323-24 (2014) (reviewing EPA adoption of its own Tailoring Rule thresholds for permitting obligations); *Gonzales v. Oregon*, 546 U.S. 243, 265-69 (2006) (reviewing Department of Justice Interpretative Rule declaring use of controlled substances for physician-assisted suicide a crime); *Whitman*, 531 U.S. at 468-71 (reviewing EPA published implementation policy determining whether implementation costs should moderate national air quality standards); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-61 (2000) (reviewing Food and Drug Administration regulation of the tobacco industry); *MCI Telecommc'ns Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 221, 231-32 (1994) (reviewing Federal Communications Commission's Fourth Report and Order exempting tariffs from nondominant carriers).

Petitioners seek to apply the major questions doctrine in a far more expansive way. Rather than considering whether an agency's actual exercise of power falls within the authority Congress vested in the agency, Petitioners ask this Court to speculate and indulge implausible imagining about how an agency might try to abuse its authority at some unknown time in the future.

Application of the major questions doctrine in this manner would expand that doctrine far beyond this Court's precedents. It would conflict with this Court's longstanding principle of "avoid[ing] premature adjudication, from entangling [itself] in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging

parties.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). Even when final agency action has been taken, the Court refrains from reviewing an agency rule if “further factual development would significantly advance [the Court’s] ability to deal with the legal issues presented.” *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 812 (2003).

Application of the major questions doctrine in these circumstances would create the sort of administrability problems that have bedeviled the Court in other contexts. For example, this Court has repeatedly grappled with the inartfully worded Armed Career Criminal Act, which enlists federal courts to determine whether various state criminal laws “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another” or “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). This Court has rejected as “indetermina[te],” “unpredictable,” and “arbitrary” speculation about “the hypothetical risk posed by an abstract generic version of [an] offense” under the ACCA and similar statutes. *Welch v. United States*, 578 U.S. 120, 124-25 (2016). The Court should avoid adopting another doctrine that would “tie[] the judicial assessment of risk to a judicially imagined” agency interpretation, “not to real-world facts or statutory elements.” *Johnson v. United States*, 576 U.S. 591, 597 (2015).

**C. Sections 7411(a) and 7411(d) Do Not, on Their Face, Implicate the Major Questions Doctrine.**

Sections 7411(a) and 7411(d) do not, on their face, raise separation of powers concerns implicating the major questions doctrine. They expressly authorize implementation of a statute in a particular manner by EPA, an agency with extensive expertise in that area. And they direct EPA to answer the specific question of what is the BSER that has been adequately demonstrated for a given category of existing stationary sources, so that the degree of achievable emission limitation can be determined and reflected in standards of performance established by the States. This specific authority “fits neatly within the language of the statute.” *See Biden v. Missouri*, No. 21A240, 2022 WL 120950, at \*2–3 (U.S. Jan. 13, 2022) (per curiam) (staying injunctions against Department of Health and Human Services’ vaccination mandate for health workers at facilities receiving Medicare and Medicaid funding because “the Secretary’s rule falls within the authorities that Congress has conferred upon him”).

Section 7411 is also clear about specific limits on EPA’s authority. The EPA’s BSER must “take[] into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.” § 7411(a)(1). EPA determines only the BSER, and it is the *States* that must then develop standards of performance for existing sources that reflect the degree of emission limitation achievable through application of the BSER. § 7411(d)(1). EPA does not directly regulate existing sources. The States retain broad authority and flexibility under

Section 7411(d) to impose and enforce standards of performance for the existing sources within their respective boundaries, leaving the agency no room beyond what Congress explicitly authorized.

States are authorized to apply standards of performance to individual existing plants based on EPA's emission guidelines; they need *not* use the means considered by EPA in determining the BSER. Section 7411 states that EPA "shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the [agency] a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . and (B) provides for the implementation and enforcement of such standards of performance." § 7411(d)(1). Only if a State fails to submit a satisfactory plan or to enforce it does EPA fill that role. § 7411(d)(2). Such a framework does not impermissibly override state choices, as this Court has observed in interpreting other similar provisions of the Clean Air Act. *See Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79, (1975) (Clean Air Act "gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410]"); *see also Massachusetts v. EPA*, 549 U.S. at 530-31 (rejecting major-questions challenge to EPA's "statutory authority to regulate the emission of [greenhouse] gases from new motor vehicles" because "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant'"; "EPA would only *regulate* emissions" consistent with technological constraints; and no congressional action "conflict[ed] in any way" with that authority).

**D. The Emission Reduction Envisioned by the CPP Rule Occurred a Decade Early Without the Rule Taking Effect, Defeating Any Major Questions Concern.**

There is no sudden transformation of agency action or exceptional economic impact here beyond statutory authority to implicate the major questions doctrine, and certainly not before the EPA has revisited on remand its authority under the statute.

Until the adoption of the ACE Rule, the EPA had consistently and “routinely,” under Administrations of both political parties, concluded that it has the authority under the statute, and exercised that authority, to determine the BSER that is adequately demonstrated under Sections 7411(a) and 7411(d) for each listed category of existing sources and that, in making that determination, could consider means other than installation of control technology “at and to” each individual source. *See Biden v. Missouri*, 2022 WL 120950, at \*4; *infra* Section II.E.

Moreover, the CPP Rule would not, in fact, have had the profound impact or costs imagined by Petitioners. *See* West Virginia Br. 20 (“Implementing even the CPP’s vision would have cost hundreds of billions of dollars”); North Am. Coal Corp. Br. 29 (“the CPP [Rule] was projected to ‘cost billions of dollars and eliminate thousands of jobs’”); Westmoreland Br. 20, 30 (“the CPP [Rule] would impose billions in price increases” and was projected to result in “billions in compliance costs . . . and hundreds of billions in foregone economic growth”). The ACE Rule explained that the reduction the CPP Rule would have required

to occur by 2030 had occurred on a nationwide basis a decade earlier, even though the CPP Rule never went into effect. The ACE Rule concluded that repealing the CPP Rule resulted in \$0 of savings for industry and no greater emissions, such that “there is likely to be no difference between a world where the CPP [Rule] is implemented and one where it is not.” JA1921. Far from being radically transformative, the CPP Rule would have required no more than what occurred in the absence of federal regulation. Petitioners’ exaggerations of its drastic consequences and costs are without merit.

**II. THE CLEAN AIR ACT DOES NOT UNAMBIGUOUSLY REQUIRE THAT, IN DETERMINING THE BSER, EPA CONSIDER ONLY MEASURES APPLIED “AT AND TO” AN INDIVIDUAL PLANT.**

The ACE Rule’s interpretation of Section 7411 is contrary to the text, structure, and purpose of the statute. Petitioners have identified nothing in any of those aspects of the statute that could clearly limit the BSER to only measures that can be implemented “at and to” an individual source.

**A. The Statute’s Use of “System” in Section 7411 Demonstrates That EPA’s BSER Determination Is Not Limited to Measures “at and to” an Individual Plant.**

1. Congress used the term “system” in Section 7411(a) to direct EPA to determine the “best system of emission reduction [BSER]” that is adequately demonstrated for each category of stationary sources that EPA lists. Congress then provided that, in light

of that “best system,” the standards of performance must reflect the emission reduction that is achievable through application of the BSER. Thus, the best system must be determined to identify the rate of achievable emission reduction, but it does not limit the means that can be considered in determining BSER or that can be used by States and power plants to meet the standard of performance set by the States.

EPA identifies the best system by considering systems that use various means to reduce emissions for the relevant category of stationary sources, here fossil fuel-fired plants. After considering those systems that have been adequately demonstrated for the source category, EPA determines the best of those systems.

The statute does not define the term “system,” so it is interpreted according to its ordinary meaning. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). As the EPA has previously concluded, the ordinary meaning of “system” is “a set of things or parts forming a complex whole; a set of principles or procedures according to which something is done; an organized scheme or method; and a group of interacting, interrelated, or interdependent elements.” JA273, JA542-43 & n.314 (citing, *inter alia*, Oxford Dictionary of English (3d ed. 2010)); *see also System*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/system> (last visited Jan. 14, 2022) (defining “system” as “a regularly interacting or interdependent group of items forming a unified whole”).

The ordinary meaning of “system” in BSER in Section 7411(a) thus does not contain any limitation of

systems that are “at and to” an individual source. Indeed, the ordinary meaning of system wholly supports the methodology of the CPP Rule wherein the agency identified three elements that would be part of a best system, which would interact and interrelate. Regardless of whether there would be debate about the BSER determination, there is nothing in the statute to limit the best system or the elements therein to measures “at and to” an individual plant.

2. The ACE Rule stripped the term “system” of substance. Ignoring a fundamental canon of statutory construction, the ACE Rule asserted that the dictionary definition of the term “system” does not matter, but instead purported to rely on the “permissible bounds of the *legal* meaning of the word.” JA1764. The ACE Rule concluded that “system” cannot be read to encompass “*any* ‘set of measures’ that would—through some chain of causation—lead to a reduction in emissions,” because, “on its own,” that could lead to “unbounded discretion” for EPA. *Id.* The ACE Rule’s misunderstanding of the statute was apparent when it relied on far-fetched suggestions, including that, unless further cabined, the term “system” could allow EPA to impose “minimum wage requirements.” Section 7411 places numerous limits on agency authority, not to mention, of course, limits on the agency’s determination of the BSER imposed by the Clean Air Act’s prohibition on arbitrary or capricious rulemaking. *See* 42 U.S.C. § 7607(d)(9).

And contrary to Petitioner West Virginia’s suggestion that the court of appeals did not consider the context of the term “system,” the court carefully considered the context surrounding the term in Section

7411(a), including the requirement for a “best” system of emission reduction, which the court of appeals reasoned “plainly places a high priority on efficiently and effectively reducing emissions.” JA109; West Virginia Br. 36-37.

3. Section 7411(a)’s use of the word “system” is also informed by the text and structure of other provisions of the statute. They confirm that best “system” as used in Section 7411(a) is not limited to “at and to” measures.

a. For example, in 1977, Congress amended Section 7411 to limit EPA’s authority to set standards of performance for *new* sources (not *existing* sources) to the degree achievable through application of the “best *technological* system of continuous emission reduction.” Pub. L. No. 95-95, § 109, 91 Stat. at 699-700 (amending Section 111(a)(1) of the Clean Air Act, codified at 42 U.S.C. § 7411(a)(1) (1982)) (emphasis added). The addition of the term “technological” and Congress’s definition of that phrase evidence a different type of system.<sup>9</sup> That is the type of terminology that Congress could have used in Section 7411(a)’s reference to “best system of emission reduction,” but did not, if it had wanted to limit the BSER to only certain

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<sup>9</sup> Congress defines “technological system of continuous emission reduction” to mean: “(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or (B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels” 42 U.S.C. § 7411(a)(7).

measures that focused more on technology applied to a particular plant.

Moreover, at that same time, Congress also amended Section 111 of the Act to require that *new* sources (not *existing* sources) demonstrate that such a “technological system of continuous emission reduction” “which is to be used *at* such source” will enable the new source to comply with the standards of performance. Pub. L. No. 95-95, § 109(e), 91 Stat. at 701 (adding Section 111(j) to the Clean Air Act) (emphasis added). Congress’s reference to the technological system as a system that “is to be used *at* such source” finds no parallel in the text of Sections 7411(a) and 7411(d) relating to the BSER that EPA determines for existing sources, which is then reflected in State standards of performance. “System” as used in BSER in Section 7411(a) is broader than “technological system” and contains no limitation that it be only a measure installed “at such source.”

Congress subsequently repealed these limitations for new sources.<sup>10</sup> Those limitations demonstrate, however, that when Congress wants to limit EPA’s authority with respect to emission reduction systems—*e.g.*, to limit these to “technological” systems, or by requiring sources to comply with applicable standards

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<sup>10</sup> See Pub. L. No. 101-549, § 403(a), 104 Stat. at 2631 (adopting the current definition of “standard of performance” for new sources as well as existing sources); Safe Drinking Water Amendments of 1977, Pub. L. No. 95-190, § 14(8), 91 Stat. 1393, 1399 (striking subsection (j) and redesignating subsequent subsections).

of performance through utilization of the system “at such source”—it knows how to do so.

Indeed, Congress has maintained the possible use of a “technological system of continuous emission reduction” in circumstances where EPA determines it is “not feasible to prescribe or enforce a standard of performance.” 42 U.S.C. § 7411(h)(1). Such circumstances include where “the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.” § 7411(h)(2). In such circumstances, EPA “may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction” which has been adequately demonstrated. § 7411(h)(1). Congress specified that if EPA “promulgates a design or equipment standard under this subsection,” it “shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.” *Id.*

The BSER that EPA determines generally for existing sources under Sections 7411(a) and 7411(d) contains no such directives. And Congress was explicit in the limited nature of Section 7411(h). That provision specifies that any design, equipment or the like under that subsection shall be treated as a standard of performance for purposes of the provisions of the Clean Air Act “*other than* the provisions of subsection (a) and this subsection.” § 7411(h)(5) (emphasis added). And in Section 7411(b)(5), Congress provided that “[e]xcept as otherwise authorized under subsection (h), nothing in this section shall be construed to

require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.” Congress knew how to make clear where standards of performance must be met through technological systems installed at the source and how to ensure that they would not mandate use of any particular technological system. EPA’s determination of the BSER in Sections 7411(a) and 7411(d) contains no similar limitations.

b. The meaning of best “system” in Section 7411(a)(1) also is informed by the language Congress used in Section 7412(d) with regard to emissions of certain air pollutants that are specifically listed as “hazardous.” The text of Section 7412(d) includes provisions for source-specific measures, confirming that the BSER that EPA determines for existing sources under Sections 7411(a) and 7411(d), which use different text, does not so provide.

Section 7412(d) requires that EPA “promulgate regulations establishing emission standards” for the listed sources of hazardous air pollutants. Congress was explicit that, for such hazardous pollutants, those emission standards “shall require the maximum degree of reduction in emissions” that is achievable “through application of measures, processes, methods, systems or techniques, including, but not limited to,” a list of specific measures. 42 U.S.C. § 7412(d)(2).

Thus, unlike Section 7411(a), Section 7412(d) focuses not on what is achievable through application of

a “best system” that EPA identifies, but rather requires EPA to establish what are known as “maximum achievable control technology” standards based on application of a range of means. And it includes in the list “systems” in addition to “measures, processes, methods, . . . or techniques,” confirming that “systems” are not limited to certain measures or techniques. 42 U.S.C. § 7412(d)(2).

Moreover, in the list of illustrative “measures” that Congress provides, 42 U.S.C. § 7412(d)(2)(A)-(E), Congress included the type of terminology that it could have used in Section 7411(a) (but did not) had it wanted to limit the BSER to measures “at and to” an individual plant. For example, Section 7412(d) expressly encompasses measures that “*collect, capture or treat* such pollutants *when released* from a process, stack, storage or fugitive emissions point.” § 7412(d)(2)(C) (emphasis added).<sup>11</sup> By contrast, Section 7411(a) includes no such language that could

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<sup>11</sup> The illustrative list of measures is broad: “measures which—

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h), or

(E) are a combination of the above.”

42 U.S.C. § 7412(d)(2)(A)-(E).

limit the BSER to consideration of only such measures.

The measures and methods of emission reduction authorized by Section 7412(d) are restricted—as they necessarily must be due to the harm from the hazardous pollutants they are controlling—to source-specific controls.<sup>12</sup> Sections 7411(a) and 7411(d) contain no similar restriction on the BSER and, as such, the best “system” under Section 7411(a) for existing stationary sources under Section 7411(d) is not limited to control technologies that can be installed “at and to” an individual source.

**B. The Statutory Text Requiring That EPA Determine the BSER That Is “Adequately Demonstrated” Establishes That EPA Looks to Means Already Used for the Source Category and, for Fossil Fuel-Fired Plants, Those Are Not Limited to “at and to” Measures.**

1. Petitioners’ arguments that EPA must confine the BSER to measures that can be implemented “at

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<sup>12</sup> See National Emission Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304, 9,444 (Feb. 16, 2012) (regulating hazardous air pollutants from power plants under Section 7412 and noting that because “[t]his is an air toxics rule . . . it does not permit emissions trading among sources” but instead “place[s] a limit on the rate of [mercury] and other [hazardous air pollutants] emitted from each affected [power plant]”).

and to” specific power plants conflict with Section 7411(a)(1)’s requirement that EPA determine a BSER that has been “adequately demonstrated.” That phrase directs EPA, when it determines the best system, to consider what methods actually *have been used* by the category of sources in question to reduce emissions.

The category of source in question here—fossil fuel-fired plants—has long used shifting of the location and timing of power generation to meet consumer demand and most effectively reduce emissions. It would make little sense for EPA to disregard these commonly used means when determining what is the “best system of emission reduction” that has been “adequately demonstrated.”

The category of fossil fueled-fired power plants presents unique circumstances because electricity differs from other products in key respects, including that most producers and consumers of electricity are tied into shared grids. Electricity cannot presently be stored at large scale, but must instead be generated at practically the instant it is needed. JA77. To maintain the uninterrupted supply of electricity to consumers’ constantly changing demand, electric power grids—“vast pool[s] of energy”—connect producers and consumers. *New York v. FERC*, 535 U.S. 1, 7 (2002). The continental United States contains three such regional grids. JA77 n.2. Multiple generation facilities supply power into each grid. To synchronize the supply of electric power with consumer demand, grid operators shift among different producers in real time to have them increase or scale back the energy they are delivering to the grid.

To manage this feat of generation coordination at the lowest cost to consumers, grid operators use some form of “constrained least-cost dispatch” approach. JA87. Under that approach, grid operators typically fulfill actual or anticipated demand by turning first to producers with the lowest variable cost, subject to adjustment based on transmission limits, environmental considerations, and other factors. This approach keeps consumers’ utility bills down, and also provides an incentive to rely first on power plants with lower variable costs, such as renewable producers, whose production costs are lower because they do not need to pay for fuel. See Br. of Amici Curiae Grid Experts, Doc. No. 1839544, No. 19-1140 (D.C. Cir. filed Apr. 23, 2020) (“Grid Experts Br.”).

In this interconnected system, shifting from one producer to another occurs constantly throughout the day, to meet marginal consumer demand and to compensate when other plants are inoperative. It is not a novel tool, as Petitioners would have it, *cf.* Nat’l Mining Ass’n Br. 39, but simply reflects how the power grid works to ensure a reliable supply of electricity for consumers at least cost to them.

Some degree of generation-shifting is the inevitable result of applying even “at and to” measures to control emissions from existing power plants. Any measure that increases the variable costs for one facility to produce power will make that facility less competitive as compared to other facilities, rendering it less attractive to utilities and grid operators.

For example, a coal-fired power plant that uses technology to scrub some of the carbon dioxide from

its flue gases must redirect some of its energy output to power its scrubber, which increases the variable costs of generating each megawatt-hour of electricity it delivers to consumers. As a result, the grid operator will call on (“dispatch”) this power plant marginally less, and call more on other—cheaper and cleaner—producers. Due to dynamics inherent in the market for electric power, “generation-shifting” will thus result from any emission control measure that changes producers’ respective operational costs.

2. Leveraging these unique aspects of the dynamic and interconnected market for electric power, EPA, States and industry have long demonstrated that measures shifting generation from some producers to others are part of an effective emission-reduction system. *See* Grid Experts Br. 13-15.

For example, in 2005, EPA promulgated its Clean Air Mercury Rule (the “Mercury Rule”).<sup>13</sup> That Rule interpreted “best system of emission reduction” to encompass emission-trading programs and incorporated into the BSER for existing power plants a program for capping and trading mercury emissions under Section 7411. 70 Fed. Reg. at 28,616. EPA’s emission guidelines reflecting “the degree of emission limitation achievable through the application of the [BSER],” 42 U.S.C. § 7411(a)(1), were premised on its projection that coal-fired units for which it was “not cost effective to install controls” would comply through “other approaches . . . including buying allowances, switching

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<sup>13</sup> Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005).

fuels, or *making dispatch changes*”—i.e., shifting generation to better-controlled units. 70 Fed. Reg. at 28,619 (emphasis added). EPA understood that some existing sources could not or would not be able to cost-effectively install the available controls. It did not provide emission guidelines based on a level that each and every individual source could cost-effectively achieve. Instead, EPA provided emission guidelines with the expectation that some sources would install the required controls and some would buy allowances from those which did or would shift generation to cleaner units.

While generation-shifting may have figured differently in the Mercury Rule’s and CPP Rule’s respective BSER determinations, the ACE Rule’s categorical rejection of generation-shifting was based not upon the agency’s consideration of any such differences, but upon its newfound view that Section 7411 unambiguously forbade anything other than measures that could be applied “at and to” an individual source. As the court of appeals found, it was not generation-shifting that was novel, but the ACE Rule’s interpretation that forbade any best system premised on “both on-site and system-wide elements.” JA127.

Petitioners provide no meaningful basis to distinguish the Mercury Rule. Most Petitioners do not even acknowledge the Mercury Rule. Although the National Mining Association attempts to distinguish that Rule on grounds that the D.C. Circuit invalidated it for other reasons, *see New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008), that fact does not undermine that *EPA* understood it had authority to incorporate measures as part of the mercury BSER

that were not “at and to” a particular source. Nat’l Mining Ass’n Br. 40-41. When the D.C. Circuit invalidated the Rule, it did so because EPA had failed to follow certain steps prescribed by Section 7412 when delisting coal- and oil-fired power plants from the lists of sources of certain “hazardous” pollutants, whose emissions are regulated under Section 7412. *New Jersey*, 517 F.3d at 578. Indeed, Section 7412(d)’s “maximum achievable control technology” standards were what the Mercury Rule attempted to evade by instead addressing power plants’ emissions under Section 7411 (under which sources would be subject to the BSER). *See* 70 Fed. Reg. at 28,608.<sup>14</sup>

Arguments by the National Mining Association (Br. 41) and North American Coal Corporation (Br. 47-48) that sources could have achieved mercury-emission limits under the Mercury Rule solely through source-specific control technology likewise offer no basis to support their effort to limit BSER under Sections 7411(a) and 7411(d) to “at and to” measures. Petitioners point to nothing showing that it would not be possible for coal-fired power plants to meet the CPP Rule’s emission guidelines solely through source-specific control technologies such as carbon capture and storage. Rather, use of such technologies would be—as the CPP Rule recognized—less cost-effective than purchasing emission credits from and shifting generation to cleaner sources. JA578-79. But the Mercury Rule likewise recognized that some sources could not have installed the referenced technology cost-effectively and, as a practical matter, would have bought emission credits or shifted generation to cleaner

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<sup>14</sup> *See supra* at pages 33-35.

sources instead. *See, e.g.*, 70 Fed. Reg. at 28,619 (“units that are not cost effective to install controls” would achieve reductions by buying credits or “making dispatch changes”).

Given that the Mercury Rule’s emission guidelines were predicated upon projected shifts in generation to cleaner sources, Petitioner Westmoreland is incorrect that no prior rule under Section 7411 “premised emission rates on reduced utilization of existing sources, through ‘shifting’ or otherwise.” Westmoreland Br. 29. And because any formulation of the BSER that changes power plants’ relative costs will cause reduced utilization of some, Petitioners’ arguments that the statute forbids consideration of systems that “forc[e] the reduced utilization” of certain facilities (*id.* at 35) or “diminish[] [their] capacity” (North Am. Coal Corp. Br. 35) must be based on an implicit distinction between means that will cause generation-shifting *as a purely incidental effect* and means considered as a candidate for the BSER *because* they will cause such generation-shifting. But nothing in the text announces such a categorical distinction between permissible and impermissible systems of emission reduction.

In the context of the electricity grid—where maintaining the power sector’s ultimate service of a reliable electricity supply necessarily requires power plants to increase and reduce their generation of electricity as consumer demand and other plants’ availability changes throughout the day—it makes no sense to suggest that the statute categorically bars *any* system of emission reduction that ultimately

causes an individual power plant to reduce its generation.

**C. The ACE Rule’s Interpretation Would Undermine the Statutory Purpose of Emission Reduction.**

Sections 7411(a) and 7411(d) provide for determination of the “*best* system of *emission reduction*” adequately demonstrated, considering cost and other factors, thus reflecting Congress’s overarching purpose of achieving cost-effective emission reduction. But the crabbed reading advocated by Petitioners and reflected by the ACE Rule would result in substantially lower and less cost-effective emission reduction than could be achieved under an approach in which the BSER considers generation-shifting.

The ACE Rule identified a series of measures that could increase the efficiency of coal-fired power plants by between 0.1 and 2.9 percent. Even assuming that States chose to implement these essentially voluntary measures *and* that these measures caused only a minimal “rebound effect,”<sup>15</sup> the agency still estimated that the ACE Rule would reduce U.S. carbon dioxide emissions by less than 1 percent. *Compare* JA1920 tbl. 3 *with, e.g.,* JA1722.

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<sup>15</sup> The “rebound effect” reflects that measures intended to increase the efficiency of coal-fired power plants will—by lowering the marginal cost of operating those plants—lead to increased utilization of those plants as compared to gas-fired plants and other sources, thereby *increasing* emissions. *See* JA92; JA659-60 (CPP Rule); JA1832-36 (ACE Rule).

By contrast, an approach that considers generation-shifting could achieve nearly 30 times the total reduction in carbon dioxide emissions than would occur under the ACE Rule, at no greater cost per ton of carbon dioxide abated. Grid Experts Br. 21-22. The inferiority of Petitioners' preferred system in comparison to an adequately demonstrated alternative system signals that their restriction is contrary to the purpose of determining the "best system of emission reduction" for power plants.

#### **D. The ACE Rule's Grammatical Theory of "Application" Is Unsound.**

The ACE Rule's interpretation of Section 7411 centered on a new reading of the word "application" in Section 7411(a)(1)'s definition of "standard of performance." JA1745. The ACE Rule reasoned that the CPP Rule incorrectly treated "application" as a synonym of "implementation," which it viewed as "send[ing] different signals." JA1761-62. The distinction, according to the ACE Rule, is that "application" of the BSER requires an indirect object, which must, and can *only*, be the physical confines of an individual plant. JA1746.

But "application" does not require an indirect object when it is used in the sense of applying a principle or process to achieve a result or outcome, such as a judge's application of precedent. JA113. The text of Section 7411(a)(1) provides for "application" generally of the BSER. The agency does that in the context of the category of stationary source at issue, here that is the application of the BSER to the source category of

fossil fuel-fired plants, not to a particular individual plant.

Moreover, as the court of appeals noted, Congress did not use the verb “apply,” but rather the noun “application,” which does not require an indirect object. JA112-13. Congress regularly uses such nominalizations “with the full awareness that their use preserves flexibility.” JA114. West Virginia contends that even as a nominalization, the best system of emission reduction must be used “*for* something.” West Virginia Br. 37. But the text of Section 7411 answers what the BSER must be used for: it must be applied to identify the achievable degree of emission limitation, which can in turn be reflected in the standards of performance States establish for existing sources.

Even proceeding from the incorrect premise that “application” must have an indirect object, the ACE Rule’s reading fails. The Rule purportedly located in Section 7411(d) an indirect object for Section 7411(a)’s use of “application.” Under that view, because Section 7411(d)(1) provides that “standards of performance” be “*for* an existing source,” Section 7411 limits the BSER to systems that can be put into operation at and to an individual existing source. *E.g.*, JA1839. The Rule reasoned that because Section 7411 defines an “existing source” as “any stationary source other than a new source,” and a “stationary source” as “any building, structure, facility, or installation which emits or may emit any air pollutant,” Section 7411 limits the BSER to systems that can be put into operation at and to a particular building, structure, facility, or installation. *Id.*

But that reasoning conflates two distinct statutory provisions and their respective functions. The “for” provision in Section 7411(d)(1) addresses standards of performance “for” any existing source that *States* must submit to EPA. By contrast, Section 7411(a)(1) addresses *EPA’s* responsibility to determine the BSER that has been adequately demonstrated for the particular category of stationary source at issue. The ACE Rule disregarded the distinct text and functions of these two provisions to manufacture an indirect object that does not exist in Section 7411(a)(1).

In addition to that maladaptation of “for,” the ACE Rule erroneously replaced that “for” with yet other prepositions (“at” and “to”) that do not appear even in that provision. Section 7411(d)(1) provides that States must set standards of performance “for” any existing source, not “at” or “to” any existing source. 42 U.S.C. § 7411(d); *see also* JA117. Section 7411(a) also does not use “at” to define either a “standard of performance,” an “existing source,” or a “stationary source.” § 7411(a)(1), (3), (6).

The ACE Rule and Petitioners’ textual argument thus fail on their own terms.

**E. The ACE Rule Compounded Its Erroneous Reading by Unnecessarily Expanding It to Eliminate the Flexibility Congress Accorded States and Power Plants.**

The ACE Rule is wholly contrary to the Clean Air Act’s provisions affording States flexibility in developing and enforcing standards of performance for existing sources, and power plants in meeting such standards.

The ACE Rule expanded the impact of its erroneous statutory reading by declaring that not only is EPA limited to “at and to” measures in determining the BSER, but also that the authority of States to determine standards of performance also is somehow limited to “at and to” measures. That contorted view of the statute would bar States and power plants from utilizing flexible compliance mechanisms that have become part and parcel of emission limitations in the industry.

Neither the text nor the structure of the Clean Air Act supports the ACE Rule’s reading. As the court of appeals observed, “[t]he [Clean Air Act] says nothing about the measures that sources may use to comply with the standards States establish under Section [7411].” JA133.

Indeed, for nearly half a century, Democratic and Republican Administrations alike have relied on the fact that power plants may meet emissions provisions under the Clean Air Act through emission-trading systems. In promulgating the Mercury Rule (*see* Part II.B.2, *supra*), the Bush Administration relied on the assumption that power plants that could be most efficiently retrofitted with control technology would over-control their own mercury emissions and sell emission credits to other plants, 70 Fed. Reg. at 28,619. Likewise, the Clinton Administration’s rule governing nitrous oxide emissions from municipal solid waste combustors relied on States allowing sources to satisfy emission limits by averaging emissions from different units within one plant and trading credits with other plants. Standards of Performance for New Stationary Sources and Emission Guidelines for Existing

Sources: Municipal Waste Combustors, 60 Fed. Reg. 65,387, 65,402 (Dec. 19, 1995).

In stark contrast, the ACE Rule's insistence that each source must achieve and implement standards of performance without averaging or trading, JA1895-99, was a marked departure from the tools that States and power plants have long utilized.

Power companies, including the Power Company Respondents, favor emission-reduction approaches that allow for trading because these market-driven approaches enable the greatest emission reduction at the lowest cost. Even if BSER were limited to "at and to" measures, there is no basis whatsoever to restrict State authority to allow power plants to use other measures for compliance purposes.

### **III. THE COURT NEED NOT ADOPT AN ARTIFICIALLY NARROW READING OF SECTION 7411 TO AVOID VIOLATION OF THE NONDELEGATION DOCTRINE.**

A. Some Petitioners argue in passing that Section 7411 must be read to avoid constitutional problems that would result from giving EPA unbounded authority to regulate greenhouse-gas emissions. Nat'l Mining Ass'n Br. 48; West Virginia Br. 44-49; Westmoreland Br. 41-44. The court of appeals, however, did not bestow, and EPA does not claim, unbounded authority.

Petitioners in effect ask this Court to choose between, on the one hand, embracing their atextual "at and to" reading of BSER and, on the other hand, giving EPA unrestrained authority, as one Petitioner

would have it, to “restructur[e] (or condemn[]) entire sectors of the economy according to its own policy objectives.” Westmoreland Br. 43. But that is a false dichotomy.

The court of appeals did not uphold the CPP Rule; it vacated the ACE Rule that had repealed the CPP Rule, and remanded the matter to EPA “to interpret the statutory language anew.” JA104. That is just what EPA is doing. See U.S. Br. in Opp’n 33. The court of appeals also did not hold that there were “no limits” on EPA’s exercise of its authority regarding emissions under Section 7411(d). North Am. Coal Br. 37; North Dakota Br. 31; West Virginia Br. 13, 19, 47; Westmoreland Br. 17. The court of appeals recognized that Section 7411(a)(1) requires EPA to take into account “cost, any nonair quality health and environmental impacts, and energy requirements” when determining what BSER has been “adequately demonstrated.” JA108. Far from concluding that EPA had unbridled authority under Section 7411, the court of appeals properly concluded that these “limitations do not include the source-specific caveat” imposed by the ACE Rule, and that Section 7411(a)(1) imposes “no limits *beyond*” these restrictions. JA106, JA108.

It is unnecessary to avoid nondelegation problems that may lurk within an interpretation of the statute that the agency does not actually espouse. A challenger’s argument that the broadest possible reading of a statute might pose nondelegation problems in no way requires skipping past sensible intermediary options. Far from avoiding constitutional issues, invocation of the canon of constitutional avoidance in

these circumstances would inject constitutional questions into a case presenting no such questions, and “*violate[]* [this Court’s] general practice of avoiding the unnecessary resolution” of such questions. See *Gregory v. Ashcroft*, 501 U.S. 452, 479 (1991) (White, J., concurring in part).

B. The nondelegation doctrine is not violated, in any event, because the plain text of Sections 7411(a) and 7411(d) provides intelligible principles to guide the agency. Congress did not “fail[] to articulate any policy or standard that would serve to confine the [Agency’s] discretion.” See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). Indeed, Congress specified a series of requirements that guide the agency in fulfilling its responsibilities under the Statute.

Sections 7411(a) and 7411(d), in particular, define *what* is regulated (harmful emissions from categories of existing stationary sources subject to standards of performance imposed by the States, 42 U.S.C. § 7411(a)(6)); *which* emissions are regulated (air pollutants not covered by NAAQS or Section 7412, § 7411(d)(1)(A)); and *how* those emissions are to be regulated (through a cooperative-federalism approach in which States establish standards of performance that reflect the degree of emission limitation achievable through application of what EPA has determined (after considering cost, other health and environmental impacts, and energy requirements) is the adequately demonstrated BSER, § 7411(a)(1)). Moreover, the Clean Air Act specifies *why* this statutory and regulatory scheme exists (among other things, “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare

and the productive capacity of its population,” § 7401(b)(1)). Far from entrusting others with the “legislative Power,” Congress enacted a detailed statute that dictates essential policy, leaving States and EPA to identify which among the rapidly evolving means are most capable of limiting emissions while serving cost and electric-supply needs. See Section I.C, *supra*.

In enacting Section 7411, Congress enlisted the scientific and technical knowledge of an expert agency to track, among other things, the latest developments in rapidly evolving means of emission control and their costs, and the reduction in emission of various pollutants achievable through application of those means in complex, dynamic markets. Foisting on Congress a nondelegable responsibility for these intricate details is neither practically feasible nor constitutionally required.

Prior to the ACE Rule, EPA itself recognized that the phrase BSER places “significant constraints” when read in its statutory context. The agency concluded that it must (1) cause reduction from sources (ruling out emission offsets), (2) be limited to emission reduction means that sources themselves take or control (ruling out demand-side energy efficiency measures), (3) be “adequately demonstrated,” based on a history of implementation and effectiveness, and (4) be “best,” taking into account, among other things, emission reduction, “cost” and “energy requirements.” 42 U.S.C. § 7411(a)(1); JA541, JA734. These statutory limitations not only provide EPA with an intelligible principle, but sufficiently make the key

policy decisions about how to limit emissions by existing stationary sources so EPA is appropriately tasked with “fill[ing] up the details” in the plan Congress has charted. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.); *id.* at 2139 (Gorsuch, J., dissenting). There is no need to misconstrue Section 7411 to avoid violating the nondelegation doctrine, because this provision raises no such constitutional problems.

Nothing in Article I requires limiting the BSER to measures that can be installed “at and to” specific existing sources. West Virginia concedes that allowing EPA to identify means for emission reduction “at and to” existing fossil fuel-fired power plants (*e.g.*, smoke-stack scrubbers) as part of the BSER for those plants does not implicate the nondelegation doctrine. West Virginia Br. 46. But the State insists that incorporating “outside the fenceline” emission controls (*e.g.*, co-firing biofuels) in determination of the BSER violates the Constitution. *Id.* It is implausible that the separation of powers doctrine should dictate the answer to that choice between different means of controlling emissions from existing fossil fuel-fired power plants.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

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IN THE  
**Supreme Court of the United States**

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WEST VIRGINIA, *et al.*,

*Petitioners,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

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THE NORTH AMERICAN COAL CORPORATION,

*Petitioner,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

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*(For Continuation of Caption See Inside Cover)*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF OF NON-GOVERNMENTAL  
ORGANIZATION AND TRADE  
ASSOCIATION RESPONDENTS**

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WESTMORELAND MINING HOLDINGS LLC,

*Petitioner,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

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NORTH DAKOTA,

*Petitioner,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

## **QUESTIONS PRESENTED**

1. Whether this dispute remains a justiciable case or controversy under Article III of the Constitution.
2. Assuming jurisdiction, whether Section 7411 of the Clean Air Act restricts the “best system of emission reduction” that is “adequately demonstrated” to measures applied “to and at” each individual source.

**RULE 29.6 STATEMENT**

American Lung Association; American Public Health Association; Appalachian Mountain Club; Center for Biological Diversity; Chesapeake Bay Foundation, Inc.; Clean Air Council; Clean Wisconsin; Conservation Law Foundation; Environmental Defense Fund; Environmental Law & Policy Center; Minnesota Center for Environmental Advocacy; Natural Resources Defense Council; and Sierra Club, all of which were petitioners and respondent-intervenors in the court of appeals, are non-profit public health and environmental organizations. Advanced Energy Economy, American Clean Power Association (successor of the American Wind Energy Association), and Solar Energy Industries Association, all of which were petitioners in the court of appeals, are nonprofit trade associations. None of these entities has any corporate parent, and no publicly held corporation owns an interest in any of them.

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## INTRODUCTION

This dispute involves the 2019 repeal of an Environmental Protection Agency (EPA) rule—the 2015 Clean Power Plan (CPP)—that has never been, and will never be, in effect. The agency has made clear that it will not reinstate either the CPP or the 2019 Affordable Clean Energy (ACE) Rule that replaced it, and instead will promulgate a new rule for power plant emissions of carbon dioxide (CO<sub>2</sub>) on a clean slate.

For all the sensational assertions in the petitioner-side briefing, the only truly dramatic feature of this proceeding is a conspicuous absence of Article III jurisdiction. The court below vacated the ACE Rule and ordered that the CPP Repeal remain in place until EPA completes its new rulemaking. Thus, no power plant is currently subject to regulation under either rule and no power companies petitioned this Court for review. Nor can any petitioning state or coal company show harm from the disposition below. There is no serious possibility that the CPP will take effect, and even if it did, market-driven trends in the electric power sector have rendered its emission-reduction targets immaterial. Indeed, when EPA repealed the CPP in 2019, it projected that the repeal would result in no cost savings for anyone. Petitioners themselves term the CPP a “legal nullity” (N.D. Br. 32 n.2) and a “relic” (N. Am. Coal Pet. 18). And their only standing proffers to date are the coal companies’ declarations asserting injury *from the ACE Rule*,

which they now claim was wrongly vacated by the court of appeals. Petitioners thus have not established their standing to invoke this Court's jurisdiction to review the decision below.

Petitioners' primary complaints, then, are about how EPA might exercise its authority in a *future* rulemaking. But such anticipatory claims are unripe. Litigants must await the result of EPA's new rulemaking, which will both define the issues for judicial review and avoid entangling the Court in an unnecessary advisory exercise over an abstract and technical policy dispute. In the absence of any extant regulation (or evidence of a concrete injury), there is no case or controversy for this Court to adjudicate.

If the dispute were justiciable, petitioners' claims would fail. This Court has already determined that Section 7411, a core provision of the Clean Air Act, "speaks directly" to power plants' emissions of CO<sub>2</sub>; gives EPA authority to decide "whether and how" to regulate those emissions; and assigns EPA the "complex balancing" task required to determine the best pollution-control systems in the context of a technical and complex record for particular industrial categories. *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 424-27 (2011).

The CPP Repeal, not the CPP itself, was before the lower court and is before this Court now. EPA based that repeal on the contention that the Clean Air Act unambiguously bars the agency, in identifying the "best system of emission reduction" under Section

7411(a)(1), from considering any emission-reduction systems that do not apply “to and at” each source. This novel “fenceline” restriction—which contradicts past EPA rules—lacks any support in the statute’s text. It also goes far beyond disapproving the CPP, instead categorically and unreasonably prohibiting EPA from considering proven emission-reductions tools including economic incentives such as emissions averaging or trading among sources, which can be cost-effective means of reducing pollution.

Nor is this novel restriction justified by major questions (or nondelegation) principles. The Court has never applied those principles to a defunct rule that would impose no meaningful compliance costs even if reinstated. “Were it not for the hundreds of pages of briefing” that petitioners present on the issue, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 465 (2001), the major questions cases’ inapplicability in such circumstances would be beyond dispute. Regardless, those cases still would not affect the outcome here, particularly in light of *AEP*’s holding (which petitioners simply ignore) that Section 7411 assigned the decision how to regulate power plants’ CO<sub>2</sub> emissions to EPA’s “expert determination.” 564 U.S. at 426.

### JURISDICTION

The D.C. Circuit entered judgment on January 19, 2021. The petitions for certiorari were timely. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1). As explained in Part I, *infra*, no justiciable

case or controversy is presented under Article III of the Constitution.

## STATEMENT OF THE CASE

### A. Congress Enacted the Clean Air Act To Ensure Effective Control of Air Pollution Over Time

The Clean Air Act of 1970 established the modern federal regulatory framework governing control of air pollution. 42 U.S.C. §§ 7401 *et seq.* Rejecting the nation's prior approaches to air pollution control, in which the federal government had little authority beyond encouraging state action, *see Train v. Nat. Res. Def. Council*, 421 U.S. 60, 63-64 (1975), the 1970 Act was a “remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution,” *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976).

Congress established a comprehensive regulatory framework to address not only the dangerous air pollutants identified at that time, but also to equip EPA and states with tools to address new air pollution dangers and to embrace evolving pollution control techniques. *See, e.g.*, 116 CONG. REC. 32,901-02 (1970) (statement of Sen. Muskie). For this purpose, Congress built in provisions to ensure the statute's continued effectiveness over decades, including technology-forcing mechanisms to spur innovation, requirements for EPA to periodically review and update standards, and the duty to list and regulate

additional pollutants when their dangers became apparent.

The Act’s architects were aware of—and concerned about—the potential for air pollution to cause climate change. *See, e.g.*, 42 U.S.C. § 7602(h) (defining “effects on welfare” as including “effects on . . . weather . . . and climate”); 116 CONG. REC. 32,914 (1970) (statement of Sen. Boggs) (“Air pollution alters climate and may produce global changes in temperature” (quoting Council on Env’tl. Quality, *First Annual Report* 71 (1970))). Congress thus gave EPA tools to address climate-altering air pollution and, indeed, required EPA to do so upon finding that it endangers public health or welfare. *Massachusetts v. EPA*, 549 U.S. 497, 528-34 (2007).

In short, the Clean Air Act, by design, has enabled EPA to adapt to “changing circumstances and scientific developments” in tackling major air pollution problems, including those not yet fully understood at the time of enactment. *Id.* at 532; *see also Whitman*, 531 U.S. at 462-63 (describing EPA’s statutory duty to review and revise air quality standards). And it has been remarkably effective: the Act has saved hundreds of thousands of lives every year,<sup>1</sup> while the U.S. economy nearly tripled in value

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<sup>1</sup> Jason Price *et al.*, *The Benefits and Costs of U.S. Air Pollution Regulations*, Industrial Economics, Inc. (May 2020), <https://www.nrdc.org/sites/default/files/iec-benefits-costs-us-air-pollution-regulations-report.pdf>; *see also EPA, The Benefits and*

over the Act’s 50-year history.<sup>2</sup> Key American industries, from automobiles to manufacturing to electric power generation, are more productive than in 1970—and vastly cleaner thanks to this law.

**B. Section 7411 of the Act Ensures “No Gaps” in the Control of Stationary Source Pollution**

Congress established a trio of Clean Air Act programs to ensure “no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.” S. Rep. No. 91-1196, at 20 (1970). Under Sections 7408 and 7409, EPA sets national ambient air quality standards for “criteria” air pollutants emitted from numerous and diverse stationary and mobile sources. States then adopt implementation plans under Section 7410, subject to EPA approval, to attain or maintain these standards.

Under Section 7412, EPA sets emissions standards for controlling “hazardous” (i.e., especially toxic) air pollutants from categories of new and existing industrial sources. These federal standards apply directly to the applicable sources, although EPA may delegate enforcement to states.

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*Costs of the Clean Air Act from 1990 to 2020* (Mar. 2011), <https://www.epa.gov/sites/default/files/2015-07/documents/summaryreport.pdf>.

<sup>2</sup> EPA, *Our Nation’s Air* (2020), [https://gispub.epa.gov/air/trendsreport/2020/#air\\_trends](https://gispub.epa.gov/air/trendsreport/2020/#air_trends).

Rounding out the trio is Section 7411, which serves to limit other harmful emissions from stationary sources. As the Court has explained:

Section [7411] of the Act directs the EPA Administrator to list “categories of stationary sources” that “in [her] judgment . . . caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” § 7411(b)(1)(A). Once EPA lists a category, the Agency must establish standards of performance for emission of pollutants from new or modified sources within that category. § 7411(b)(1)(B); *see also* § 7411(a)(2). And, most relevant here, § 7411(d) then requires regulation of existing sources within the same category. For existing sources, EPA issues emissions guidelines, *see* 40 CFR §§ 60.22, 60.23 (2009); in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, § 7411(d)(1).

*AEP*, 564 U.S. at 424. Section 7411(d) applies only to existing sources’ emissions of dangerous pollutants that are not listed as criteria or hazardous

pollutants—that is, not covered by Sections 7408-7410 or 7412.

A “standard of performance” is:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. § 7411(a)(1).

In developing emissions guidelines, EPA: (1) identifies all “system[s] of emission reduction” that are “adequately demonstrated” for the source category in question; (2) identifies the “best” of those systems, considering emission-reducing efficacy, costs, and other factors; and (3) identifies “the degree of emission limitation achievable through the application” of that system. *Id.* In other words, EPA sets an emission limit for the source category, which is incorporated into the guideline. The guideline provides procedures for states to submit plans establishing a standard for each existing source that is “no less stringent” than the guidelines’ emission limit, acknowledges states’ authority to consider source-specific factors including “remaining useful life,” and establishes parameters

for EPA to approve or disapprove the plans. 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.24a(c). If a state “fails to submit a satisfactory plan,” or simply chooses not to submit one, EPA must step in to prescribe a federal plan that imposes emission performance standards directly on the state’s existing sources. 42 U.S.C. § 7411(d)(2). EPA has issued regulations under Section 7411(d) in 13 instances for source categories ranging from municipal waste combustors to landfills to aluminum plants, based on a variety of systems tailored to the category and pollutant.<sup>3</sup>

### **C. EPA’s Authority Includes Regulation of Greenhouse Gas Pollution from Power Plants**

In *Massachusetts*, this Court held that the Clean Air Act’s “definition of ‘air pollutant’” unambiguously encompasses greenhouse gases—compounds like CO<sub>2</sub> that “act[] like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat.” 549 U.S. at 505, 528-29. The Court held that EPA *must* regulate these air pollutants if the agency concluded their emissions “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” *Id.* at 528 (quoting 42 U.S.C. § 7521(a)(1)).

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<sup>3</sup> Robert R. Nordhaus & Ilan W. Gutherz, *Regulation of CO<sub>2</sub> Emissions From Existing Power Plants Under §111(d) of the Clean Air Act: Program Design and Statutory Authority*, 44 ENVTL. L. REP. 10,366 (2014).

Two years later, EPA issued an “endangerment determination” for CO<sub>2</sub> and other greenhouse gases after completing a comprehensive assessment of the scientific evidence. 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA determined that the risks from greenhouse gas pollution include intensified heat waves, worsened air quality, greater frequency and intensity of storms and droughts, rising sea levels, and increased spread of food- and water-borne pathogens, among many other effects. *Id.* at 66,497, 66,524-36. EPA concluded that emissions of greenhouse gases, including CO<sub>2</sub>, endanger the public health and welfare of current and future generations and thus require Clean Air Act regulation. *Id.* at 66,516-36.

Years before *Massachusetts*, states and land trusts brought federal common law nuisance suits against five electric power companies, seeking injunctive relief to limit the companies’ CO<sub>2</sub> emissions. *AEP*, 564 U.S. at 418-19. This Court held in 2011 that the plaintiffs’ federal common law claims were superseded by the Clean Air Act, explaining: “*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. . . . And we think it equally plain that the Act ‘speaks directly’ to emissions of carbon dioxide from [fossil fuel-fired power] plants.” *Id.* at 424. The Court found it “altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions” from power plants under Section 7411(d).

*Id.* at 428. To that end, Congress directed the agency to perform the “complex balancing” of “the environmental benefit potentially achievable, our Nation’s energy needs and the possibility of economic disruption.” *Id.* at 427.

In the decade since *AEP*, the impacts of climate change have become more evident and severe. The 2018 Fourth National Climate Assessment—a Congressionally-mandated report by 13 federal agencies—concluded that “the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans’ physical, social, and economic well-being are rising.”<sup>4</sup> In 2021 “the U.S. experienced 20 separate billion-dollar weather and climate disasters that killed at least 688 people—the most disaster-related fatalities for the contiguous U.S. since 2011.”<sup>5</sup>

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<sup>4</sup> U.S. Global Change Research Program, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* 36 (2018), <https://www.globalchange.gov/nca4>; see also Global Change Research Act of 1990, 15 U.S.C. §§ 2921-2961.

<sup>5</sup> National Oceanic and Atmospheric Administration, *U.S. saw its 4th-warmest year on record, fueled by a record-warm December* (Jan. 10, 2022), <https://www.noaa.gov/news/us-saw-its-4th-warmest-year-on-record-fueled-by-record-warm-december>.

#### **D. EPA Promulgates the Clean Power Plan**

In 2015, EPA promulgated the CPP to address existing power plants' CO<sub>2</sub> emissions. 80 Fed. Reg. 64,662 (Oct. 23, 2015), JA273. The CPP established emissions guidelines under Section 7411(d) for the fossil fuel-fired power plant source category, including steam electric generators (primarily coal-fired plants) and combustion turbines (primarily gas-fired plants). JA483-90.

The CPP based its “best system of emission reduction” on the primary techniques already used by states and power companies to curtail CO<sub>2</sub> emissions from existing power plants. Relying on extensive stakeholder input, EPA determined the “best system” was a combination of three “building blocks”: (1) improving efficiency (heat rate) at coal-fired plants; (2) substituting electricity generation from lower-emitting gas plants for generation from higher-emitting coal plants; and (3) substituting generation from new zero-emitting renewable energy sources for generation from coal- and gas-fired plants. JA298-99. EPA found that these measures, at the selected level of stringency, were widely employed in practice, achieved emission reductions cost-effectively, and would not adversely affect the reliable supply of electricity. JA654-90. The agency identified other technologies, such as carbon capture and co-firing natural gas with coal, that were “technically feasible and within price ranges that the EPA has found to be cost effective,” but determined that the three

“building block” measures in combination were less expensive. JA578.

EPA applied the “best system” to quantify the degree of CO<sub>2</sub> emission limitation achievable by covered sources. The agency set limits in the form of two uniform emission rates for coal and gas plants respectively, to be phased in from 2022 to full implementation in 2030. JA301. EPA determined that each plant could achieve the applicable limit at a reasonable cost by reducing its own emissions and by acquiring “emission rate credits” from expanded lower-emitting or new zero-emitting generation, thus reducing its adjusted CO<sub>2</sub> emission rate to meet the limit. JA690-92, 969-71. EPA also provided states with considerable flexibility in developing their plans, giving states the option to apply the uniform rates to individual sources within the state, or to adopt trading programs or other compliance strategies to meet equivalent state goals. JA1063-88.

In 2015 EPA projected that, upon full implementation of the CPP, power sector CO<sub>2</sub> emissions in 2030 would be 32 percent below 2005 levels.<sup>6</sup> JA354. The agency estimated that the CPP’s climate and health benefits (projected at \$19 to \$29 billion in 2025 and \$32 to \$48 billion in 2030) would vastly outweigh its compliance costs (projected at \$1.0

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<sup>6</sup> In 2015, power sector CO<sub>2</sub> emissions were already 12 percent below 2005 levels. U.S. Energy Information Administration, *Today in Energy* (May 9, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=26152>.

to \$3.0 billion in 2025 and \$5.1 to \$8.4 billion in 2030). JA354-56. As discussed *infra* pp. 16-17, EPA in 2015 greatly overestimated the CPP's effect and costs, as the CPP's emission-reduction projections were achieved more than a decade ahead of schedule, and with no Section 7411(d) regulation at all.

States and industry parties challenged the CPP in the D.C. Circuit. Asserting that the rule would be extremely costly and would prompt immediate large-scale coal retirements,<sup>7</sup> the petitioners sought an emergency stay of the CPP, which was denied by the D.C. Circuit, Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016), ECF No. 1594951, but granted by this Court in February 2016, *West Virginia v. EPA*, 577 U.S. 1126 (2016). These challenges to the CPP were held in abeyance following a change of administration, and ultimately dismissed as moot after the new administration's repeal and replacement rule took effect. Order, *West Virginia v. EPA*, No. 15-1363, (D.C. Cir. Sept. 17, 2019), ECF No. 1806952.

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<sup>7</sup> See, e.g., Coal Indus. Appl. for Immediate Stay at 4, *Murray Energy Corp. v. EPA*, No. 15A778 (U.S. Jan. 27, 2016) (citing Seth Schwartz, *Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry*, Energy Ventures Analysis (Oct. 2015)); States Appl. for Immediate Stay at 46, *West Virginia v. EPA*, No. 15A773 (U.S. Jan. 26, 2016) (citing same).

**E. EPA Repeals the Clean Power Plan, and Replaces It with the ACE Rule, Based Solely on a Newly Constrained Legal Interpretation**

In July 2019, EPA finalized the rulemaking at issue here, which repealed the CPP and replaced it with the ACE Rule. 84 Fed. Reg. 32,520 (July 8, 2019), JA1725. EPA based its CPP repeal on a single ground: a new interpretation of the Act, under which Section 7411 unambiguously limits the best system of emission reduction to emission controls applied “to and at the level of the individual source.” JA1731, 1769. EPA’s General Counsel explained at the time: “We have not chosen to ask the Court to defer to our policy judgment. We are asking the court to rule on the face of the statute. It’s a bold move.”<sup>8</sup>

The consequence of EPA’s new “to and at” limitation was not only to prohibit any reliance on shifting generation between fossil-fueled power plants and renewable energy facilities that were outside the designated Section 7411 source category. It reached even further to also bar the agency—and states and industry—from any use of economic incentives such as emissions averaging and trading, even among fossil-fueled power plants in the same source category,

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<sup>8</sup> Lee Logan, *Facing Risks, EPA’s Counsel Defends ‘Bold’ ACE Rule Legal Interpretation*, INSIDE EPA (Aug. 2, 2019), <https://insideepa.com/daily-news/facing-risks-epa-s-counsel-defends-bold-ace-rule-legal-interpretation>.

when establishing and complying with standards.<sup>9</sup> Prohibiting any averaging or trading tools conflicted with past EPA actions under Section 7411(d), including regulations for nitrogen oxide emissions from municipal waste combustors, 60 Fed. Reg. 65,387, 65,402 (Dec. 19, 1995), and for mercury emissions from coal-fired power plants, 70 Fed. Reg. 28,606, 28,620 (May 18, 2005), *vacated on other grounds, New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). *See* Power Cos. Br. 38-41.

In the 2019 rules, EPA also acknowledged “significant changes in the electric sector” that had occurred since EPA finalized the CPP in 2015. JA1675. These changes included “large-scale market trends” that were “anticipated to result in the continued decline of coal-fired generation and capacity,” and an expectation that renewable energy sources would “account for a significant portion of all new capacity into the future.” JA1675, 1679. Power sector CO<sub>2</sub> emissions were also declining accordingly: EPA observed that, “[e]ven after the CPP was stayed,” sources in 2018 were “30 percent below 2005 levels,” on the verge of meeting the CPP’s 2030 projections.

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<sup>9</sup> *See, e.g.*, JA1896 (“In this final action, the EPA determines that: Neither (1) averaging across designated facilities located at a single plant; nor (2) averaging or trading between designated facilities located at different plants are permissible measures for a state to employ in establishing standards of performance for existing sources or for sources to employ to meet those standards.”); *see also* JA1903 (“Accordingly, trading is not permissible under CAA Section [74]11.”).

JA1690-91. As a result—and in contrast to the CPP challengers’ earlier claims of substantial harm—EPA concluded that repealing the CPP was “not anticipated to have a meaningful effect on emissions of CO<sub>2</sub> or other pollutants or regulatory compliance costs.” JA1719-20. In fact, 2019 power sector emissions were 32 percent below 2005 levels, achieving the CPP’s 2030 projections more than a decade ahead of schedule.<sup>10</sup>

The ACE Rule, which EPA promulgated to replace the CPP, reflected EPA’s new limited view of its authority under Section 7411. For existing coal-fired power plants, EPA determined that the best system of emission reduction could include only minor improvements to plants’ operational efficiency. JA1787. The ACE Rule did not specify any minimum emission limitation for performance standards in state plans, instead providing only an advisory list of seven “candidate technologies” to improve plant efficiency. JA1808. EPA directed states to “evaluate the applicability” of these “candidate technologies” to each source in the state, and then derive an individual standard for each unit. JA1870. However, EPA did not mandate any minimum level of efficiency improvement, and indeed confirmed that standards need not reflect *any* efficiency or emissions improvement at all. JA1808-09, 1887.

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<sup>10</sup> U.S. Energy Information Administration, *Today in Energy* (June 9, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=48296>.

EPA rejected other available measures that would have offered far greater emission reductions while still comporting with the ACE Rule's newly constrained statutory interpretation. *See, e.g.*, JA1839-44 (rejecting co-firing with natural gas); JA1853-58 (rejecting carbon capture). According to EPA's own analysis, the ACE Rule's minimal "best system of emission reduction" would achieve little, if any, emission reduction. EPA's one modeled scenario projected that the Rule would reduce CO<sub>2</sub> emissions from coal plants by approximately one percent relative to business as usual, and would reduce overall power-sector emissions by considerably less than one percent.<sup>11</sup>

Even though EPA continued to include existing gas-fired power plants in the listed category of sources, it did not identify any best system of emission reduction for them under the ACE Rule and thus left those sources unregulated. JA1791-92.

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<sup>11</sup> *See* EPA, *Regulatory Impact Analysis for the Repeal of the Clean Power Plan and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units*, at 3-11, tbls. 3-3 & 3-15, tbl. 3-8 (June 2019) [hereinafter ACE RIA] [https://www.epa.gov/sites/default/files/2019-06/documents/utilities\\_ria\\_final\\_cpp\\_repeal\\_and\\_ace\\_2019-06.pdf](https://www.epa.gov/sites/default/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf).

### **F. The Court of Appeals Reviews, and Rejects, EPA's Sole Ground for the Repeal**

State and local governments, power companies, environmental and public health groups, and clean energy trade associations petitioned the D.C. Circuit for review of the CPP Repeal and the ACE Rule. The court of appeals majority confined its review to the “sole ground” EPA asserted for the repeal—i.e., that Section 7411’s text unambiguously constrains EPA to determine a best system of emission reduction using only improvements “at and to existing sources.” JA103. The court granted the petitions for review, concluding that “nothing in the text, structure, history, or purpose of Section 7411 . . . compels the reading the EPA adopted.” JA131.

The court also explained that the dispute did not “fit the major-question mold of prior cases.” JA139. It noted that EPA had “not just the authority, but a statutory duty” to regulate greenhouse gas emissions from power plants, and the Act already “contains its own limits on regulation, like mandating that the EPA take into account such factors as available technology and the cost of compliance.” JA138-39. The court concluded that “each critical element of the Agency’s regulatory authority on this very subject has long been recognized by Congress and judicial precedent.” JA136.

Because EPA defended the CPP Repeal and ACE Rule solely on an erroneous legal interpretation, the

court did not decide whether the ACE Rule approach was “permissible . . . as a matter of agency discretion.” JA102-03. Nor did it address numerous record challenges to that rule. Likewise, the court did not consider the legality of the CPP itself, which was no longer before it.

The dissent below would have held that EPA lacked authority to promulgate either the CPP or the ACE Rule because power plants’ emissions of mercury and other hazardous air pollutants are regulated under Section 7412. JA217.

Shortly after the D.C. Circuit’s ruling, the incoming Administrator announced that, under his leadership, EPA would undertake a new rulemaking to address power plant CO<sub>2</sub> emissions, starting from a “clean slate.”<sup>12</sup> EPA moved for a partial stay of the court’s mandate, explaining that the agency did not intend to implement either the CPP or the ACE Rule and stating that “no Section 7411(d) rule should go into effect until [a new rulemaking] is completed.” JA258. The agency explained that the CPP’s initial compliance deadlines had “long since passed” and that “ongoing changes in electricity generation” mean that the CPP’s 2030 emission-reduction projection has “already been achieved by the power sector.” JA265. Granting EPA’s unopposed motion, the D.C. Circuit ordered that the CPP Repeal remain in effect “until

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<sup>12</sup> *Hearing on the Nomination of Michael S. Regan to be Administrator of the Environmental Protection Agency Before the S. Comm. on Env't. & Pub. Works*, 117th Cong. 42-43 (2021).

the EPA responds to the court's remand in a new rulemaking action." JA271. Thus, with the ACE Rule vacated and the CPP Repeal still in place, JA272, no Section 7411(d) regulation for CO<sub>2</sub> emissions from existing power plants is in effect: states face no planning deadlines, and regulated entities face no compliance obligations.

### SUMMARY OF ARGUMENT

The CPP is not, and has never been, in effect. The lower court ordered that it remain inoperative until EPA completes a new rulemaking. Thus, neither petitioners nor any other parties are subject to any obligations under the CPP (or under the ACE Rule that replaced it). The CPP's deadlines for submitting state plans passed more than three years ago, and its emission-reduction goals have been rendered immaterial, even in the absence of regulation.

Petitioners have therefore failed to satisfy their burden to establish standing to invoke this Court's jurisdiction. No petitioner is, has been, or will be injured by the inoperative CPP. Nor has any petitioner demonstrated that it will be reinstated; that any reinstatement, should it somehow occur, would harm them; or that the vacatur of the ACE Rule injures them either. The parties' disputes about the CPP Repeal have been overtaken by events and no longer present a live case or controversy.

Similarly non-justiciable are petitioners' hypotheticals about regulations that EPA *might* adopt

in the future. The court of appeals' decision did not pass upon such regulations or bless any particular regulatory design. Review of forthcoming regulations must await their final promulgation and the availability of a new administrative record.

Even if this dispute were justiciable, petitioners' claims are meritless. The court of appeals properly confined its review to the sole ground asserted in the CPP Repeal—i.e., that Section 7411 unambiguously precludes EPA from considering any emission-reduction systems that do not apply “to and at” a source. Section 7411 does not contain the unwritten “to and at” restriction the CPP Repeal posited. When Congress wished to add any such restriction in the Act, it did so expressly, by using words like “retrofit” or “technology.” Petitioners' labored efforts to insert such a restriction into Section 7411 lack support in the statute. And they would unreasonably preclude not just the CPP, but *any* kind of emissions averaging and trading among sources—prohibiting common and cost-effective measures that have long been used throughout the power industry and that EPA used in multiple prior rules.

Unable to locate their preferred restriction in the statute, petitioners resort to invoking major questions principles. But such principles have never applied in a situation resembling the one here—a dispute about the repeal of a never-implemented rule that EPA found would impose “no costs” even if implemented. In any event, the major questions cases do not change

the outcome. This Court has already held that Section 7411 “speaks directly” to power plants’ emissions of CO<sub>2</sub> and assigns to EPA the decisions “whether *and how*” to regulate them. *AEP*, 564 U.S. at 424, 426 (emphasis added). Petitioners simply ignore those prior holdings.

Finally, North Dakota alone contends that the CPP was unlawful because it established binding emission limits in its guidelines. This Court should not consider the claim, which EPA did not assert as a basis for the CPP Repeal and which the court of appeals therefore did not address. The claim is wrong, in any event. Congress modeled Section 7411(d) on the cooperative federalism framework that appears elsewhere in the Act. North Dakota would upend that archetypical framework, however, and invite the pollution problems that Congress designed the modern Clean Air Act to address.

## ARGUMENT

### I. These Cases Are Not Justiciable

These petitions should be dismissed because they do not present a justiciable case or controversy. “Article III demands that an ‘actual controversy’ persist throughout all stages of litigation.” *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) (the Court has an “obligation” to assure itself of Article III jurisdiction). This means

both that standing must be shown to invoke this Court's jurisdiction, and that a case must be dismissed if it becomes moot. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64-73 (1997). And when an underlying cognizable injury dissipates during litigation, parties cannot substitute an alternative theory of injury premised on contingent future actions that have not yet taken shape. *Trump v. New York*, 141 S. Ct. 530, 533-35 (2020) (per curiam). Here, petitioners identify no redressable injury caused by the disposition below; recent events and ongoing changes in the industry have mooted the parties' dispute over the CPP Repeal; and any complaints about future EPA rulemakings are unripe. The cases have therefore each "lost [their] character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).

1. No petitioner has satisfied its burden to "explain how the elements essential to standing are met." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Although most standing cases consider whether a plaintiff met those elements when initiating suit, Article III also requires that a party have standing when invoking an appellate court's jurisdiction to review a judgment below. *Id.*; *Hollingsworth*, 570 U.S. at 705. And parties that do not seek such review cannot supply the requisite standing. *See Diamond v. Charles*, 476 U.S. 54, 63-64 (1986). This Court has thus "repeatedly recognized" that when an intervenor below asks this Court to

reverse a judgment that the primary party did not challenge, *Bethune-Hill*, 139 S. Ct. at 1951, the intervenor must show that it “independently ‘fulfills the requirements of Article III’”—i.e., that it has been injured by the disposition below, and that a favorable ruling from this Court would redress the injury, *Wittman v. Personhuballah*, 578 U.S. 539, 543-44 (2016) (quoting *Arizonans for Off. Eng.*, 520 U.S. at 65). The petitioning party also “bears the burden” of establishing a non-obvious redressable injury in this Court through “record evidence.” *Id.* at 545. Petitioners here have failed to do so.

a. Consider, first, the petitioning coal companies in Nos. 20-1531 and 20-1778. Below, these companies argued primarily that coal-fired power plants were *exempt* from regulation under Section 7411(d). *See* JA176-98. This Court declined to grant review of that question, however, 142 S. Ct. 418 (limiting Case No. 20-1778 to Question 2), and neither company identifies any injury that would be redressed by a favorable decision on the remaining questions presented. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (“standing is not dispensed in gross”).

The companies cite no evidence, for example, that the court of appeals’ disposition of the CPP Repeal will result in any decreased consumption of their coal. The CPP is not—and never has been—in effect. Nor do the companies show any “serious likelihood” that the CPP will take effect in the future. *TransUnion LLC v.*

*Ramirez*, 141 S. Ct. 2190, 2212 (2021). EPA does not intend to resurrect the CPP, Fed. Resps. Br. in Opp’n 16-17, and the D.C. Circuit ordered that EPA’s repeal remain in effect until it completes a superseding rulemaking, JA270-71. One of the companies itself describes the CPP as a “relic” that is “years out of date” and “unlikely” ever to be reinstated. N. Am. Coal Pet. 18. And even if the CPP were somehow to take effect, the coal companies “have not identified record evidence” that it would injure them. *Wittman*, 578 U.S. at 545. To the contrary, the record before this Court indicates that the CPP’s emission-reduction targets are now immaterial, JA269, such that, as EPA put it in 2019, there would likely be “no difference between a world where the CPP is implemented and one where it is not,” JA1921.

Petitioner North American Coal contends that its case is nonetheless justiciable because the Court could reinstate the ACE Rule, the vacatur of which purportedly “harms Petitioner.” N. Am. Coal Cert. Reply 1, 3. But the company appeared below only as a petitioner *challenging* the ACE Rule. And its present contention is contrary to the only evidence submitted in support of its standing: a declaration asserting that the ACE Rule *harmed* the company, and that “[t]hese harms will be alleviated if the Rule is vacated.” Coal Indus. Pet’rs Opening Br. at ADD3, *Am. Lung Ass’n v. EPA*, No. 19-1140 (D.C. Cir. Apr. 17, 2020), ECF No. 1838666. Petitioner Westmoreland Mining Holdings (which, unlike North American Coal, also intervened to defend the CPP Repeal) submitted a similar

declaration below, *id.* at ADD4-ADD6, and continued to base its standing before this Court on harms to the company from the ACE Rule, Westmoreland Cert. Reply 11. Neither company can thus now argue—nor has either company attempted to show—that it would benefit from reinstatement of the ACE Rule, which EPA projected would decrease coal production through 2035. ACE RIA at 3-25 to 3-26.

b. The petitioning states in Nos. 20-1530 and 20-1780 have likewise failed to “independently demonstrate standing” before this Court. *Bethune-Hill*, 139 S. Ct. at 1951. These states did not submit evidence or present argument in support of their standing below. It may not have been incumbent on them to do so as intervenors then, but the “situation changed” when they invoked this Court’s jurisdiction as petitioners. *Id.* And yet the states still marshal no evidence supporting their standing to challenge the disposition below, which does not require them “to do or refrain from doing anything.” *Hollingsworth*, 570 U.S. at 705.

The only evidence here that arguably bears on the states’ standing is now years out of date and not traceable to the judgment below. *See California v. Texas*, 141 S. Ct. 2104, 2118 (2021) (evidence of harm from a materially different time period insufficient to establish states’ standing). North Dakota has cited evidence from its 2016 stay application, for example, asserting that the CPP would have injured the state had it taken effect on its original timeline. N.D. Pet. 17-18. Other states that sought a stay six years ago

also complained at that time about the burden of preparing state plans to comply with the CPP. *See, e.g., States Appl. for Immediate Stay*, 41-46, *West Virginia v. EPA*, No. 15A773 (U.S. Jan. 26, 2016). But no petitioning state identifies comparable evidence of actual or imminent harm that it faces from the CPP *now*, particularly following the lower court order (which the states did not oppose, and which they do not challenge here) that leaves the CPP's *repeal* in place until EPA completes a new rulemaking.

Even if the defunct CPP could somehow spring to life, it is doubtful that it would still harm the petitioner states, given “significant changes” in the electric power sector and the fact that the “deadline for state plan submittals in 2018 has already passed.” JA1675, 1694. EPA projected in 2019 that, if the CPP had taken effect then, it already would have been “non-binding” in more than half the states, including ten of those petitioning here, because emissions had already fallen below the CPP's targets. JA1673, 1717-19. EPA further explained that this projection was conservative, as it did not account for recent market developments, implementation delays, or interstate trading, which were likely to eliminate any remaining emission-reduction requirements in other states and to render a reinstated CPP “non-binding entirely.” JA1674-1719. Ongoing market trends and the passage of time have made this outcome all the more likely. Thus, irrespective of whether the petitioning states had standing when they first intervened below, they have not proffered the requisite evidence that

they “possess standing now.” *Wittman*, 578 U.S. at 544.<sup>13</sup>

2. For similar reasons, the parties’ dispute as to the CPP Repeal has been overtaken by events and is now moot. *See Arizonans for Off. Eng.*, 520 U.S. at 66-67 (distinguishing between an intervenor’s standing to seek appellate review, and whether an originating plaintiff’s claim has become moot). It is “not enough” for purposes of Article III that a live controversy existed “when suit was filed, or when review was obtained in the Court of Appeals.” *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477-78 (1990). Rather, to support this Court’s jurisdiction, a claim must remain live “at all stages of review.” *Arizonans for Off. Eng.*, 520 U.S. at 67. And here, for the reasons described above, the parties’ dispute about the CPP Repeal has “lost the essential elements of a justiciable controversy.” *Id.* at 48. Reinstatement of the CPP now cannot “reasonably be expected” to occur. *Camreta v. Greene*, 563 U.S. 692, 711 (2011); *see also* N.D. Br. 33 n.2 (describing the CPP as a “legal nullity”). Nor would that occurrence likely result in decreased

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<sup>13</sup> Alone among the states, North Dakota asserts standing to seek reinstatement of the ACE Rule, N.D. Cert. Reply 1-11, but it never explains how vacatur of that rule caused it any concrete injury, nor how it would benefit from reinstatement. At most, North Dakota vaguely suggests the rule’s vacatur somehow harmed its sovereign authority to regulate emissions from coal plants in the state. *Id.* at 3, 10. North Dakota identifies no state regulation that it cannot adopt now, however, in the absence of an EPA rule.

emissions in any event, given the ongoing changes and trends in the power sector. Thus, although the parties “continue to dispute the lawfulness” of the CPP Repeal, those disputes are now “abstracted from any concrete actual or threatened harm” and “fall[] outside the scope” of Article III. *Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

3. Because power plants are presently subject to no regulation under Section 7411(d), several petitioners instead press unripe complaints about hypothetical future regulations that, they claim, the judgment below authorizes. *See, e.g.*, W. Va. Br. 19-26; N. Am. Coal Br. 22-32. These petitioners misconstrue the D.C. Circuit’s holding: that court did not “bless” even the CPP, much less give EPA “unfettered” authority in future Section 7411(d) rulemakings. *See supra* pp. 18-20. Regardless, any prediction about what regulations will result from EPA’s inchoate rulemaking is “no more than conjecture’ at this time.” *Trump*, 141 S. Ct. at 535 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)). Petitioners make bold assertions about what they expect EPA will do, but the truth is they “cannot know” what regulations will materialize. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983). It would be “wholly novel,” and “amount to the rendering of an advisory opinion,” for this Court to pass upon regulations “not yet promulgated.” *EPA v. Brown*, 431 U.S. 99, 104 (1977).

Instead, consistent with regular practice, the new rulemaking process must first “run its course”—both to sharpen the questions for the Court, *Trump*, 141 S. Ct. at 536, and to shield it from unnecessary entanglement in policy disputes until the agency’s decision “has been formalized and its effects felt in a concrete way,” *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). In the meantime, petitioners will suffer no concrete harm, as neither any extant rule nor the disposition below requires them “to do anything or to refrain from doing anything.” *Id.* at 733. If EPA’s new rule implicates any of petitioners’ present concerns, petitioners can challenge that rule in a new suit, 42 U.S.C. § 7607(b)(1)—including by seeking a stay, if warranted. But contrary to petitioners’ contentions, e.g., N. Am. Coal Cert. Reply 9, W. Va. Cert. Reply 6, neither the costs of such further litigation, nor any legal uncertainty that may exist in the interim, suffices to “justify review in a case that would otherwise be unripe.” *Ohio Forestry*, 523 U.S. at 735; see also *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 811 (2003).

Petitioners would prefer this Court’s review now, of course, and some parties might feel that they need to take steps in the meantime to prepare for “what they think is likely to come in the form of new regulations.” *In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). But such anticipatory costs have “never been a justification” for courts to review

the scope of an agency's statutory authority in the midst of an ongoing rulemaking. *Id.* Instead, Article III requires that courts "put aside" any impulse to settle the merits of an important dispute "for the sake of convenience and efficiency." *Hollingsworth*, 570 U.S. at 704-05. Allowing parties to obtain judicial review based on "hypothetical" future actions that may not occur as anticipated, or that might not occur at all, would "water[] down the fundamental requirements of Article III." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

In short, for reasons of standing, mootness, and ripeness, these petitions do not present a "proper case or controversy," *DaimlerChrysler*, 547 U.S. at 341, 352, and therefore must be dismissed.

## **II. Section 7411 Does Not Contain the Restriction That Was EPA's Sole Basis for Repealing the Clean Power Plan**

EPA premised its repeal of the CPP on a novel construction that Section 7411 restricts the "best system of emission reduction" to measures applied "to and at" the source. That restriction finds no support in the statute. Instead, the Act calls on EPA to evaluate emission-reduction measures used in particular source categories, subject to express constraints that do not include the Repeal's atextual invention. Petitioners' attempts to find such a "fenceline" restriction in various and sundry cues fall short. Moreover, this restriction would unreasonably bar commonplace, cost-effective trading and

averaging measures among regulated sources, forcing EPA (and states and industry) to rely on emission-reduction techniques that are both more expensive and less effective. This Court should reject the restriction, just as the court of appeals correctly did below.

1. Assuming these cases are justiciable, the only actions under review are those EPA took in 2019—the CPP Repeal and the replacement ACE Rule. It is a “foundational principle of administrative law” that courts must limit their review of agency action to the “grounds that the agency invoked when it took the action.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 578 (2015)); see *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The actions at issue here relied on a single statutory ground: that Section 7411 “unambiguously limits the [best system of emission reduction] to those systems that can be put into operation *at* a building, structure, facility or installation.” JA1746; see also JA1787, 1796, 1893 (“at and to”); JA1769, 1893 (“to and at”); JA1836 (“at or to”); JA1758 n.65 (“to or at”). The court of appeals properly confined its review to this asserted ground, and therefore did not consider (let alone resolve) whether EPA could have repealed the CPP for other reasons, or whether the CPP itself was arbitrary, capricious, or otherwise contrary to law. 42 U.S.C. § 7607(d)(9)(A). Litigation raising such claims was previously dismissed as moot. *Supra* p. 14. And here, the court of appeals correctly concluded that Section

7411 does not contain the atextual “to and at” restriction that EPA invoked in the CPP Repeal.

2. Section 7411 assigns to EPA, as the “expert agency,” the “complex balancing” of considerations, *AEP*, 564 U.S. at 427-29, that goes into determining the “best system of emission reduction” for designated categories of stationary sources. 42 U.S.C. § 7411(a)(1). Congress knew that Section 7411 would apply to a wide array of different source categories and pollutants, from sewage sludge incinerators to grain elevators to magnetic tape coating facilities, and scores more. *See, e.g.*, 40 C.F.R. Pt 60, Subparts Cb-UUUUa. In that context, Congress sensibly declined to spell out particular pollution-reduction techniques for each of these many industrial categories and pollutants. Instead, by using the term “system,” Congress directed EPA to examine means of reducing emissions across a diverse, evolving range of categories. A. Scalia & B. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 32-33 (2012) (“general terms... are adopted to cover a multitude of situations that cannot practicably be spelled out in detail or ever foreseen”). It assigned to EPA’s expert judgment the technical and record-dependent questions concerning which pollution-reduction techniques are “adequately demonstrated,” taking account of cost and other specified factors. 42 U.S.C. § 7411(a)(1). As the court of appeals recognized, these statutory criteria Congress enacted “simply do not include” a limitation that the system be contained

within the physical confines of a single regulated source. JA106.

Section 7411's text, structure, and function thus make it highly improbable that Congress would have *impliedly* restricted the range of adequately demonstrated systems of emission reduction that EPA may consider in seeking the "best" one. And that is particularly so given that Congress clearly "knew how to draft the kind of statutory language" that the CPP Repeal "seeks to read into" Section 7411. *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016). In multiple provisions of the Clean Air Act, Congress *expressly* limited pollution-control measures to those integrated into the physical design or processes of a source. For instance, another provision applicable to stationary sources directs EPA to predicate standards upon the "best available *retrofit* technology." 42 U.S.C. § 7491(b)(2)(A), (d)(2) (emphasis added). A different section of the Act requires EPA to consider "the retrofit application of the best system of continuous emission reduction, taking into account available technology." *Id.* § 7651f(b)(2). And yet another provision requires EPA to identify the "best available control technology" at the source level. *Id.* § 7479(3); *see also id.* § 7412(g)(2) (requiring source-specific "maximum achievable control technology" for hazardous air pollutants with

comparatively localized health effects); Power Cos. Br. 32-35.<sup>14</sup>

These other provisions of the Act make the “absence” of any comparable textual limitation in Section 7411(a)(1) “all the more telling.” *Romag Fasteners, Inc. v. Fossil Grp., Inc.*, 140 S. Ct. 1492, 1495 (2020). This Court generally does not assume that Congress “omitted from its adopted text requirements that it nonetheless intends to apply,” especially when, as here, “Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.” *EPA v. EME Homer City Gen., L.P.*, 572 U.S. 489, 510 (2014) (quoting *Jama v. ICE*, 543 U.S. 335, 341 (2005)).

3. Particularly against this statutory backdrop, petitioners’ various arguments for why the “best system of emission reduction” can include only “measures implemented at the source level,” W. Va. Br. 13; *see* N.D. Br. 47-48; N.A. Coal. Br. 33-40, are

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<sup>14</sup> Even within Section 7411, Congress has paid particularly close attention to the contours of the best system. In 1977 Congress inserted a modifier—the “best *technological* system...”—but solely for new sources. Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 685, 700 (1977) (emphasis added). In 1990, Congress removed the word “technological” for new sources and reverted to the original formulation for both new and existing sources. Pub. L. No. 101-549, § 403(a), 104 Stat. 2399, 2631 (1990). The current version of Section 7411 also retains requirements concerning “technological system[s] of continuous emission reduction” for certain applications not at issue in this case. 42 U.S.C. § 7411(a)(7); *see, e.g., id.* § 7411(b)(5), (j)(1).

unavailing. As explained in greater detail in Respondent States and Municipalities' brief (at Sec. I.A.1.b), the scattered words and phrases at which petitioners grasp would be a "surprisingly indirect route" for Congress to have conveyed such an "important and easily expressed message." *Cnty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994)).

First, the court of appeals properly rejected the convoluted contention, *cf.* W. Va. Br. 37-38, that the term "application" in Section 7411(a)(1) implies the indirect object "any existing source" in Section 7411(d)(1). JA110-116. As the court explained, even assuming (wrongly) that an indirect object must be found, petitioners' candidate ("any existing source") is not a plausible referent. *Id.*; *see also* States & Muns. Br. Sec. I.A.1.b.

Second, the terms "achievable" and "adequately demonstrated" (*see* W. Va. Br. 34-35; N.D. Br. 48) likewise do not limit a permissible "system of emission reduction" to measures implemented "to and at" each source. Systems based on emissions trading, for example, manifestly can yield "achievable" emission limits and are, in fact, already "adequately demonstrated" for the source category. *See* Power Cos. Br. Sec II.B.; *see also supra* pp. 15-16 (noting that EPA had relied on such commonplace and cost-effective trading and averaging measures in prior Section 7411 rules).

Third, contrary to petitioners' suggestion otherwise, W. Va. Br. 33-34; N. Am. Coal Br. 34-35; Westmoreland Br. 35-36, neither the phrase "standard of *performance*" nor "*existing* source" requires EPA to guarantee that sources maintain historical levels of output (nor does either phrase in any way support petitioners' claimed "to or at" requirement). "Existing" merely distinguishes between new and modified sources, subject to direct federal regulation under Section 7411(b), and already-built sources, which are regulated through state plans issued under Section 7411(d)(1). "Performance" in this context plainly refers to a source's quantitative *emissions* performance, not its production or output levels. See 42 U.S.C. § 7411(a)(1) ("standard of performance" means a "standard *for emissions*" (emphasis added)); see also *id.* § 7602(k) (defining "emission standard" as a "requirement . . . which limits the quantity, rate or concentration of emissions"). A source may comply with the emission limit specified in a standard of performance through any means that reduces emissions.<sup>15</sup> And even standards based on inside-the-fenceline measures, such as end-of-stack pollution controls, would violate

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<sup>15</sup> In this respect, Section 7411 distinguishes standards of performance from "design, equipment, work practice, or operational standard[s]," which must be met in the specific manner prescribed by regulation. 42 U.S.C. § 7411(h)(1), (2). EPA is permitted to set design standards only when performance standards cannot be issued because it is not practicable to confine or measure sources' emissions. *Id.*

petitioners' output-maintenance conception, as such standards commonly affect how much plant operators choose to run their plants, or even whether they continue to operate at all. Power Cos. Br. Sec. II.B.; *see also* Westmoreland Br. 33-34 (acknowledging onsite controls' "incidental impacts on generation").

Fourth, petitioners wrongly assert that various terms in Section 7411(d)(1) govern the scope of the "best system of emission reduction" that EPA must identify under Section 7411(a)(1). *See, e.g.*, N. Am. Coal Br. 34-35 ("for"); W. Va. Br. 34-35 ("source"). But there is "no basis—grammatical, contextual, or otherwise"—to read the language of Section 7411(d) "upstream" in that way. JA106; *see* States & Muns. Br. Sec. I.A.1.b. And even if there were, the terms still do not establish the limitations petitioners are seeking. That Section 7411(d)(1) requires standards of performance for any existing source "in the singular," N. Am. Coal Br. 33-34, for example, does not dictate how the "best system" must be determined in Section 7411(a)(1). It simply means that performance standards must cover each such existing source within the state, not leaving any unregulated.

It is also telling that Congress used the less restrictive preposition "*for* an existing source" in Section 7411(d)(1), which does not import a "fenceline" limit, in contrast to the prepositions "to" or "at" that petitioners try to smuggle into the statute. A performance standard that permits a source to comply through use of marketable emission credits, for

example, is plainly a standard “for” that source. *See* JA107. And Section 7411(d) notably cross-references Section 7410, which expressly authorizes the use of “economic incentives such as fees, marketable permits, and auctions of emissions rights,” 42 U.S.C. § 7410(a)(2). A blanket ban on using such tools in Section 7411(d)—which is the consequence of the CPP Repeal’s interpretation—would contravene Congress’s decision to allow EPA and states to carry out that provision using the same kinds of emission-reduction measures that are available under Section 7410. That result would needlessly and unreasonably raise the cost and reduce the effectiveness of regulation.

4. For all these reasons, the court of appeals correctly concluded that the CPP Repeal’s interpretation of Section 7411 was “simply not supported by the text, let alone plainly and unambiguously required by it.” JA117-18. As a result, the court held the rule invalid and remanded it to the agency.

The absence of a “to and at” restriction in the statute does not leave EPA’s determination of the best system unconfined, however. In addition to the express limitations in Section 7411(a)(1) mentioned above, EPA’s choice must meet the tests of reasoned decisionmaking and be adequately supported by the record. 42 U.S.C. § 7607(d)(9). These constraints are real and substantial. *See infra* Sec. III.b.

Moreover, rejecting the CPP Repeal's atextual and unreasonably rigid restriction does not require resolving the legality of the CPP or any of its constituent elements. Petitioners complain that the CPP's "best system" went beyond prior applications of emissions averaging and trading by predicated its standards for coal plants in part on emission-reduction credits made available by new renewable generating facilities, which are not "stationary sources" of air pollution, *see* 42 U.S.C. § 7411(a)(3), and thus are not in the EPA-designated category of fossil-fueled power plants. This particular aspect of the CPP is the target of petitioners' repeated claim that the CPP unlawfully required coal plants to purchase credits from new, non-emitting power generators. *E.g.*, W. Va. Br. 1, 7, 8, 25; N. Am. Coal Br. 24; N.D. Br. 9.

The CPP, however, was not before the lower court. Consequently, the court of appeals did not consider whether that rule's reliance on new renewable electricity generation—or, for that matter, any other aspect of that rule—exceeded EPA's authority or was arbitrary and capricious. *Supra* pp. 18-20. Rather, it properly confined its review to the grounds that EPA asserted in the CPP Repeal. Should EPA, in a future rulemaking, adopt any measures that resemble features of the CPP, its action will be subject to judicial review. But this Court should reject petitioners' invitation to pass judgment now on the legality of a hypothetical future rule.

### **III. Reliance on Major Questions Principles Is Misplaced**

Unable to locate their preferred reading of Section 7411 in the statute, petitioners contend that either the CPP or some future EPA rule would run afoul of the Court's major questions cases. This contention confuses what rule is before the Court, misconstrues the Court's relevant cases, and would not provide a basis for upholding the EPA actions at issue in any event.

1. The agency actions before this Court are the CPP Repeal and the ACE Rule—not the CPP itself, or any future rule that EPA might adopt. And contrary to petitioners' heavy reliance on major questions cases, the record before this Court—which is the agency's record at the time it took the repeal action under review—indicates that the CPP would *not* have had any “vast ‘economic or political significance.’” *Util. Air Regulatory Grp. v. EPA (UARG)*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). In fact, that record shows that EPA's initial projections of the CPP's impact were vastly overstated. And it also shows that petitioners' claims, made originally in support of the 2016 stay but repeated here, were even far more exaggerated. *Supra* pp. 16-18. EPA thus concluded in 2019 that there was likely “no difference between a world where the CPP is implemented and one where it is not,” JA1921, and that repealing the CPP would “not . . . have a meaningful effect on

emissions of CO<sub>2</sub> or other pollutants or regulatory compliance costs.” JA1719-20.

This Court has never applied major questions principles to an agency rule that is defunct, not under review, and that would have no meaningful impact even if it were reinstated. Nor has the Court ever applied such principles to a hypothetical future rule whose impacts are not yet knowable. *See* *Power Cos. Br. Sec. I.A.* Regardless, even if the Court did consider those principles here, they still would not affect the outcome.

2. Petitioners invoke the Court’s expectation that Congress will “speak clearly” when assigning to an agency certain highly significant “decisions.” *UARG*, 573 U.S. at 324. But this Court held in *AEP*, over ten years ago, that Section 7411 “speaks directly” to power plant CO<sub>2</sub> emissions; and further, that Congress assigned to EPA the “decisions” both “whether *and how*” to regulate them. 564 U.S. at 424, 426 (emphasis added). Petitioners conspicuously ignore these key holdings.

The major questions cases are thus simply inapposite here. Particularly in light of *AEP*, this dispute does not resemble the types of category errors at issue in those cases, each of which involved agency actions that would “significantly expand [an agency’s] regulatory authority” into new areas that “fall[] outside of [its] sphere of expertise.” *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. \_\_\_, slip op. at 6-7 (2022) (per curiam) (rejecting emergency vaccination

standard where agency had authority to promulgate “workplace safety standards, not broad public health measures”); *see also, e.g., Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021) (per curiam) (public health agency’s eviction moratorium would “intrude” in landlord-tenant relationships in a way “markedly different” from other authorized regulatory measures); *UARG*, 573 U.S. at 324 (EPA interpretation would cause an “enormous and transformative expansion” of regulatory authority by applying a permitting program intended for a few hundred large sources to millions of smaller ones).

Here, by contrast, power plants have long been one of the most intensively regulated sources of air pollution under the Clean Air Act. Indeed, regulating those sources’ emissions, under several different provisions of the Act, is one of EPA’s core functions. *E.g.*, 42 U.S.C. §§ 7410-12, 7470-79, 7491-92, 7501a *et seq.*, 7651-51o. And this Court has further recognized that Section 7411 assigns the decision of “how to regulate” power plants’ CO<sub>2</sub> emissions, specifically, to EPA’s “expert determination.” *AEP*, 564 U.S. at 426.

a. EPA’s determination of the “best system of emission reduction” for power plant CO<sub>2</sub> emissions thus “does not fit the major-question mold of prior cases.” JA138. Petitioners nonetheless claim that the CPP was so “significant” that Congress needed to pre-approve the specific system that EPA chose. But absent the kind of category error described above, nothing within the grab-bag of various, imprecise

factors petitioners invoke—such as compliance costs, the age of the statute, or the degree of subsequent congressional attention, *e.g.*, W. Va. Br. 20, Westmoreland Br. 30—can justify such an onerous and unprecedented requirement.<sup>16</sup>

First, Congress knew that Clean Air Act regulations could impose significant costs on polluters, *cf. Union Elec.*, 427 U.S. at 256-57, and it specifically directed EPA to consider “cost” when establishing emission limits based on the best system of emission reduction. *See* 42 U.S.C. § 7411(a)(1). Compliance costs might therefore be relevant in determining whether a Section 7411 rule is arbitrary and capricious, *id.* § 7607(d)(9)(A), but they cannot be a principled threshold barrier to agency rulemaking altogether. *See* States & Muns. Br. Sec. II.A.2. Indeed, this case highlights why cost would be an unpredictable basis for imposing such a barrier: As noted above, projections about the CPP’s effect proved grossly overstated. Contrary to petitioners’ claims

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<sup>16</sup> Nor can any such requirement be justified by federalism principles. *See* W. Va. Br. 26-31. Pollution limits for regulated sources may affect private sector decisions on power plants’ dispatch order or resource mix, but those effects do not usurp other state authority or require additional authorization from Congress. *See FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 286, 295-96 (2016) (rejecting argument that demand response regulation was a federal “power grab,” and distinguishing regulations that “inevitably[] influenc[e]” areas of state control from those that “intrude on the States’ power”); *see also* States & Muns. Br. Sec. II.A.3; *infra* Sec. IV (discussing Section 7411(d)’s cooperative federalism framework).

that the CPP would have cost “hundreds of billions of dollars,” W. Va. Br. 20, EPA’s initial projections were orders of magnitude smaller,<sup>17</sup> and the record for the agency decision before this Court indicates it would have had *no* meaningful effect on regulatory compliance costs at all, JA1719-20.

Second, Section 7411 does not contain a sell-by date. To the contrary, Congress designed this provision (and the Act as a whole, *supra* pp. 5-6) to equip EPA with tools to address new pollution problems and to impose new regulatory requirements over time. Indeed, Congress specifically tasked EPA with periodically reviewing and updating its best system determinations and emission limits at least every eight years. 42 U.S.C. § 7411(b)(1)(B). Applying Section 7411 to achieve reductions based on evolving systems of emission reduction is thus a feature, not a bug, of the provision.

Third, that Congress later considered, but did not pass, a variety of bills related to climate change does not give license to construe Section 7411 narrowly. *See* W. Va. Br. 24-25; N. Am. Coal Br. 26-27; Westmoreland Br. 31-32. This Court rejected a nearly identical argument in *Massachusetts*, 549 U.S. at 529-

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<sup>17</sup> EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, at tbl. ES-5, ES-9 (Aug. 2015) (projecting compliance costs of \$1-\$3 billion in 2025 and \$5.1-\$8.4 in 2030) [https://www3.epa.gov/ttnecas1/docs/ria/utilities\\_ria\\_final-nspse-egus\\_2015-08.pdf](https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-nspse-egus_2015-08.pdf).

30, and has since reiterated that failed legislation is a “particularly dangerous’ basis on which to rest an interpretation of an existing law,” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). That is especially so here, where the failed bills include at least as many proposals to block climate action as to extend that authority.<sup>18</sup> One recent instance of *successful* legislation, by contrast, is more telling: In June 2021 Congress adopted, and the President signed into law, a Congressional Review Act resolution that reinstated EPA Section 7411 regulations for climate-destabilizing methane emissions, underscoring EPA’s responsibility to regulate existing greenhouse gas sources under Section 7411(d).<sup>19</sup>

b. Petitioners also try to justify their reliance on major questions cases by invoking purported nondelegation concerns. But Section 7411 is at least as richly elaborated as Section 7409, which this Court held to be “well within the outer limits” of any nondelegation problems. *Whitman*, 531 U.S. at 472-

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<sup>18</sup> See, e.g., S. Amdt. 359 to S. Con. Res. 8, 113th Cong. (2013); H.R. 2081, 113th Cong. (2013); S. 2365, 112th Cong. (2012); H.R. 3409, 112th Cong. (2012); S.J. Res. 26, 111th Cong. (2010); S. 1622, 111th Cong. (2009); H.R. 2846, 111th Cong. (2009); S. 570, 111th Cong. (2009).

<sup>19</sup> See Pub. L. No. 117-23, 135 Stat. 295 (2021); H.R. Rep. No. 117-64, at 7-8 (2021) (noting the “critical importance of section [74]11(d) in Congress[’s] scheme” and referring to the attempt to rescind EPA’s authority to regulate existing oil and gas sources’ methane emissions as “enormously consequential”).

74. And once again petitioners ignore *AEP*, which described Section 7411's detailed assignment of rulemaking authority to EPA and praised it as "altogether fitting." 564 U.S. at 424-28.

Section 7411 directs EPA to, among other things, reduce pollution by basing "achievable" "emission limitation[s]" on "adequately demonstrated" measures taking into account "cost" and "energy" considerations. 42 U.S.C. § 7411(a)(1). These and other "numerous substantial and explicit constraints," JA146, provide more than the "intelligible principle" required under this Court's cases. See *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). They also set forth standards "sufficiently definite and precise" to enable courts to review "whether Congress's guidance has been followed." *Id.* at 2136 (Gorsuch, J., dissenting) (cleaned up). Indeed, the D.C. Circuit has not hesitated to strike down Section 7411 regulations for failing to reasonably account for the factors Congress listed in the statute. *E.g.*, *New York v. Reilly*, 969 F.2d 1147 (D.C. Cir. 1992); *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980). Accordingly, there is no need to resort to nondelegation principles to police EPA's exercise of authority under the provision.

3. As noted previously, the court of appeals properly limited its review of the CPP Repeal to the grounds asserted therein, and thus had no occasion to consider whether the CPP and each of its constituent

elements complied with Section 7411. This is true regarding the court's major questions analysis, too.

The court of appeals correctly concluded that major questions principles do not “confine” EPA to adopting solely those emission standards that can be implemented “to and at” a source. JA135. Notably, the CPP Repeal invoked major questions principles *not* as an independent basis for repealing the CPP, but only in passing to purportedly “confirm[]” its particular interpretation of Section 7411. JA1770.

As noted above, the consequence of that atextual restriction was to prohibit *all* emissions averaging and trading, even among plants within the same source category—a regulatory approach that EPA had used in prior Section 7411(d) rules going back more than two decades. *Supra* pp. 15-16. These cases thus do not present the narrower issue of how major questions principles might apply to the more innovative aspect of the CPP, which premised Section 7411(d) standards on emission-reduction credits from new renewable generating facilities that are not themselves regulated sources. That is a question for another day, if EPA includes that feature in a future rule.

#### **IV. North Dakota's Arguments Are Meritless**

North Dakota alone defends the CPP Repeal on a different ground: that EPA purportedly lacks authority to include binding emission limitations in its guidelines; and that states may determine the

limits for existing sources untethered from any federal requirements. N.D. Br. 14, 35. But contrary to North Dakota's contention, Br. 32-33, EPA did not assert this as a ground for repealing the CPP, see JA1739-86. As a result, the court of appeals did not address it either. Thus, even if the issue were properly presented here, *but see Chenery*, 332 U.S. at 196, this Court should “not decide in the first instance issues not decided below,” *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999)); *see also Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 800 (2017) (this “is a court of final review and not first view” (quoting *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 56 (2015))).

If this Court does consider North Dakota's arguments, it should reject them. North Dakota radically misconstrues the cooperative federalism structure of Section 7411(d). Congress modeled this program on the Act's archetypical cooperative federalism provision, Section 7410, which provides for federal requirements implemented through state plans. *See Train*, 421 U.S. at 64-65.<sup>20</sup> Section 7411(d) directs EPA to “prescribe regulations which shall establish a procedure similar to that provided by [S]ection [74]10,” and provides that the agency “shall

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<sup>20</sup> *See also Hodel v. Va. Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (describing a similar statute's “program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs”).

have the same authority . . . as [it] would have under Section [74]10(c)” to prescribe a federal plan if a state fails to submit a satisfactory one. 42 U.S.C. § 7411(d)(1)-(2). EPA promulgated the Section 7411(d) regulations in 1975 (and repromulgated them in 2019 without pertinent change), providing for EPA to issue industry-specific emission guidelines. *See* 40 Fed. Reg. 53,340 (Nov. 17, 1975); JA 1933-65; 40 C.F.R. Part 60, Subparts B and Ba (2019). As this Court has explained, “in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction.” *AEP*, 564 U.S. at 424. *See* JA1947 (“The EPA is finalizing a definition of ‘emission guidelines’ that requires them to reflect the degree of emission limitation of emission [*sic*] achievable through application of the [best system]”). Notably, North Dakota did not challenge the 2019 regulations below.

Under this framework, EPA determines the degree of emission limitation that reflects the best system of emission reduction adequately demonstrated, considering the quantity of pollution reduced, cost, and other factors. 42 U.S.C. § 7411(a)(1). Thus, while states may issue plans that “take the first cut” at directly regulating existing sources “within [their] domain[s],” those plans must “*achieve EPA’s] emission standards,*” *AEP*, 564 U.S. at 428 (emphasis added), on which basis EPA then determines whether state plans are “satisfactory,” 42 U.S.C. § 7411(d)(2)(A); *see also* 40 C.F.R. § 60.24a(c)

(performance standards in state plans “shall be no less stringent than [EPA’s] corresponding emission guideline(s)”). If North Dakota were correct, EPA and reviewing courts would have no clear basis for determining whether a state plan was “satisfactory.” Far from prohibiting EPA from establishing the amount of emission reduction achievable for regulated sources, the statute *requires* EPA to do so. North Dakota is therefore simply wrong to assert that states, not EPA, may determine “what ‘emissions limitations’ are ‘achievable’” on their own. N.D. Br. 14, 35.

North Dakota is likewise wrong in asserting that states may “make source-specific determinations in setting th[e] standards of performance ‘for any existing source’” without substantive EPA oversight. *Id.* at 35. Section 7411(d) does permit a state to issue a variance from “generally applicable emissions standards” to a particular source, *AEP*, 564 U.S. at 427, in light of factors such as its “remaining useful life,” 42 U.S.C. § 7411(d)(1). But a state must “demonstrate[]” in the plan it submits to EPA that each such variance is warranted due to unreasonable costs related to factors such as a source’s age. 40 C.F.R. §§ 60.24(f), 24a(e). This limited and fact-based authority to issue variances is thus not the free pass that North Dakota imagines to ignore federal emission limits broadly achievable by sources in a given category.

North Dakota’s inversion of the statutory structure would take the country back to a world

before the modern Clean Air Act provided for minimum federal standards for industrial pollution control. Congress replaced that prior approach in 1970, *see Train*, 421 U.S. at 64, with a framework that has greatly reduced air pollution and stands guard to meet new dangers as they arise today.

### CONCLUSION

The cases should be dismissed. If not, the judgment below should be affirmed.

Respectfully submitted,

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JANUARY 2022

## Message

**From:** Campbell, Ann [Campbell.Ann@epa.gov]  
**Sent:** 1/21/2022 1:46:41 AM  
**To:** Goffman, Joseph [Goffman.Joseph@epa.gov]  
**Subject:** RE: ACTION: WH Request

I noticed that too and checked it against the database and it's listed similarly. I will need to check it out with the team.

## Ex. 5 Deliberative Process (DP)

Ann (Campbell) Ferrio  
Chief of Staff  
EPA/Office of Air and Radiation  
Office: 202 566 1370

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**From:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Sent:** Thursday, January 20, 2022 8:34 PM  
**To:** Campbell, Ann <Campbell.Ann@epa.gov>  
**Subject:** RE: ACTION: WH Request

## Ex. 5 Deliberative Process (DP)

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

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**From:** Campbell, Ann <Campbell.Ann@epa.gov>  
**Sent:** Thursday, January 20, 2022 7:08 PM  
**To:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Subject:** Re: ACTION: WH Request

Ok, will add the info after dinner.

Ann (Campbell) Ferrio  
Chief of Staff  
Office of Air and Radiation  
(202) 566-1370

On Jan 20, 2022, at 6:54 PM, Goffman, Joseph <Goffman.Joseph@epa.gov> wrote:

Thanks, Ann

## Ex. 5 Deliberative Process (DP)

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation

U.S. Environmental Protection Agency

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**From:** Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>  
**Sent:** Thursday, January 20, 2022 5:47 PM  
**To:** Goffman, Joseph <[Goffman.Joseph@epa.gov](mailto:Goffman.Joseph@epa.gov)>  
**Subject:** ACTION: WH Request

# Ex. 5 Deliberative Process (DP)

Ann (Campbell) Ferrio  
Chief of Staff  
EPA/Office of Air and Radiation  
Office: 202 566 1370

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**From:** Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Sent:** Thursday, January 20, 2022 11:21 AM  
**To:** Campbell, Ann <Campbell.Ann@epa.gov>  
**Cc:** Cassady, Alison <Cassady.Alison@epa.gov>  
**Subject:** FW: can you send

Ann – Let's connect on this right after Fuels Biweekly. Thanks.

Joseph Goffman  
Principal Deputy Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency

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**From:** Zaidi, Ali A. EOP/WHO <Ali.A.Zaidi@eop.gov> Ex. 6 Personal Privacy (PP)  
**Sent:** Thursday, January 20, 2022 11:19 AM  
**To:** Cassady, Alison <Cassady.Alison@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>  
**Subject:** can you send

The list we discussed yesterday – in whatever rough form? Would really be helpful. TY

**Ali A. Zaidi**  
Deputy National Climate Advisor and Deputy Assistant to the President  
Ex. 6 Personal Privacy (PP)

## Message

**From:** Carbonell, Tomas [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=15EC2A6AD2934C669F6A675E7CF4961B-CARBONELL,]  
**Sent:** 11/30/2021 3:10:12 PM  
**To:** Hoffer, Melissa [Hoffer.Melissa@epa.gov]  
**CC:** Weaver, Susannah [Weaver.Susannah@epa.gov]  
**Subject:** RE: Call with States

Hi Melissa, thanks – I emphasized our recusal limitations to Megan Herzog and don't expect that the states will offer any comments that touch on litigation. There's not a formal agenda for the call, but here are the topics we discussed in our prep meeting last week:

## Ex. 5 Attorney Client (AC)

**From:** Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
**Sent:** Tuesday, November 30, 2021 9:57 AM  
**To:** Carbonell, Tomas <Carbonell.Tomas@epa.gov>  
**Cc:** Weaver, Susannah <Weaver.Susannah@epa.gov>  
**Subject:** Call with States

Hi Tomas—do we have an agenda for the call with the states today? I want to make sure that any items from which we are recused are at the end so we can all leave the call before they are discussed.

Melissa

Melissa A. Hoffer  
Principal Deputy General Counsel  
U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202.440.1671  
E: [hoffer.melissa@epa.gov](mailto:hoffer.melissa@epa.gov)

## Message

**From:** Carbonell, Tomas [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=15EC2A6AD2934C669F6A675E7CF4961B-CARBONELL,]  
**Sent:** 9/2/2021 7:47:40 PM  
**To:** Weaver, Susannah [Weaver.Susannah@epa.gov]; Sasser, Erika [Sasser.Erika@epa.gov]; Ting, Kaytrue [Ting.Kaytrue@epa.gov]; Culligan, Kevin [Culligan.Kevin@epa.gov]  
**CC:** Marks, Matthew [Marks.Matthew@epa.gov]; Versace, Paul [Versace.Paul@epa.gov]; Johnson, Mary [Johnson.Mary@epa.gov]  
**Subject:** RE: suggested final paragraph for section III

Looks great to me as well!

Thank you all once again for the phenomenal work on the proposal. The latest revisions have really sharpened and strengthened the document.

## Ex. 5 Deliberative Process (DP)

Tomás

**From:** Weaver, Susannah <Weaver.Susannah@epa.gov>  
**Sent:** Thursday, September 2, 2021 3:27 PM  
**To:** Sasser, Erika <Sasser.Erika@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>  
**Cc:** Marks, Matthew <Marks.Matthew@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>  
**Subject:** RE: suggested final paragraph for section III

This looks great to me—thanks to you both!

**From:** Sasser, Erika <Sasser.Erika@epa.gov>  
**Sent:** Thursday, September 2, 2021 1:03 PM  
**To:** Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>  
**Cc:** Weaver, Susannah <Weaver.Susannah@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>  
**Subject:** RE: suggested final paragraph for section III

## Ex. 5 Deliberative Process (DP)

**From:** Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Sent:** Thursday, September 02, 2021 11:52 AM  
**To:** Sasser, Erika <Sasser.Erika@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>  
**Cc:** Weaver, Susannah <Weaver.Susannah@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>; Carbonell, Tomas <Carbonell.Tomas@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>  
**Subject:** suggested final paragraph for section III

## **Ex. 5 Deliberative Process (DP)**

I figured circulating it via email might be the fastest way for all of you to review it. Let me know if you have problems with it or any suggestions. I will plan to drop it into the draft once it seems like we have consensus.

Thanks!

Kaytrue

## **Ex. 5 Attorney Client (AC)**

U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-6380  
E: [ting.kaytrue@epa.gov](mailto:ting.kaytrue@epa.gov)

## Message

**From:** Culligan, Kevin [Culligan.Kevin@epa.gov]  
**Sent:** 9/21/2021 3:33:53 PM  
**To:** Carbonell, Tomas [Carbonell.Tomas@epa.gov]  
**Subject:** FW: Revised MATS NPRM and Cost TSD for OMB Passback

I wanted to make sure you are aware of this back and forth. I think we are in a good place (Susannah has agreed to let the package move on), but I wanted you to be aware that she had raised the question about an OGC comment that we got in the second round of the OMB review (as you can see from the dialogue below, it was a repeat comment we had already worked through and Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

- Kevin

**From:** Weaver, Susannah <Weaver.Susannah@epa.gov>  
**Sent:** Tuesday, September 21, 2021 11:05 AM  
**To:** Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>  
**Cc:** Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Hutson, Nick <Hutson.Nick@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>  
**Subject:** RE: Revised MATS NPRM and Cost TSD for OMB Passback

Thanks all. I talked to Kevin and Matt offline, and don't plan to hold things up over this. We're sure to get comment on this whether we solicit it or not and can continue the conversation on how/whether to address reliance interests in our final rule.

Congratulations to you all on the impending clearance of a really great proposal!

**From:** Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Sent:** Tuesday, September 21, 2021 10:44 AM  
**To:** Culligan, Kevin <Culligan.Kevin@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Weaver, Susannah <Weaver.Susannah@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>  
**Cc:** Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Hutson, Nick <Hutson.Nick@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>  
**Subject:** RE: Revised MATS NPRM and Cost TSD for OMB Passback

# Ex. 5 Attorney Client (AC)

U.S. Environmental Protection Agency  
 Office of General Counsel  
 1200 Pennsylvania Avenue, NW  
 Washington, DC 20460

T: 202-564-6380  
E: [ting.kaytrue@epa.gov](mailto:ting.kaytrue@epa.gov)

---

**From:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Sent:** Tuesday, September 21, 2021 10:27 AM  
**To:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>; Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Anderson, Lea <[anderson.lea@epa.gov](mailto:anderson.lea@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>; Hutson, Nick <[Hutson.Nick@epa.gov](mailto:Hutson.Nick@epa.gov)>; Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)>  
**Subject:** RE: Revised MATS NPRM and Cost TSD for OMB Passback

## Ex. 5 Attorney Client (AC)

---

**From:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Sent:** Tuesday, September 21, 2021 10:09 AM  
**To:** Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Anderson, Lea <[anderson.lea@epa.gov](mailto:anderson.lea@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>; Hutson, Nick <[Hutson.Nick@epa.gov](mailto:Hutson.Nick@epa.gov)>; Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Subject:** RE: Revised MATS NPRM and Cost TSD for OMB Passback

## Ex. 5 Attorney Client (AC)

---

**Matthew C. Marks**  
Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276  
E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

---

**From:** Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>  
**Sent:** Tuesday, September 21, 2021 9:53 AM  
**To:** Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Cc:** Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Anderson, Lea <[anderson.lea@epa.gov](mailto:anderson.lea@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>; Hutson, Nick <[Hutson.Nick@epa.gov](mailto:Hutson.Nick@epa.gov)>; Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Subject:** RE: Revised MATS NPRM and Cost TSD for OMB Passback

# Ex. 5 Attorney Client (AC)

**From:** Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>  
**Sent:** Tuesday, September 21, 2021 7:25 AM  
**To:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Cc:** Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Anderson, Lea <[anderson.lea@epa.gov](mailto:anderson.lea@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>; Hutson, Nick <[Hutson.Nick@epa.gov](mailto:Hutson.Nick@epa.gov)>; Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Subject:** RE: Revised MATS NPRM and Cost TSD for OMB Passback

Bringing in the program because I meant to add them below and forgot, and we need to hold off sending to OMB until we hear back from Susannah.

**From:** Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Sent:** Tuesday, September 21, 2021 7:19 AM  
**To:** Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>  
**Cc:** Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Anderson, Lea <[anderson.lea@epa.gov](mailto:anderson.lea@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>  
**Subject:** Re: Revised MATS NPRM and Cost TSD for OMB Passback

# Ex. 5 Attorney Client (AC)

**Matthew C. Marks**  
 Deputy Associate General Counsel  
 Air and Radiation Law Office  
 Office of General Counsel  
 U.S. Environmental Protection Agency  
 1200 Pennsylvania Avenue, NW  
 Washington, DC 20460  
 T: 202-564-3276  
 E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)

On Sep 21, 2021, at 3:34 AM, Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)> wrote:

Susannah,

The changes in this draft are in response to the second round of comments from the interagency group or are changes that I made in my final read-through of the preamble.

# Ex. 5 Attorney Client (AC)

# Ex. 5 Attorney Client (AC)

Best,  
Paul

---

**From:** Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>  
**Sent:** Monday, September 20, 2021 9:41 PM  
**To:** Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Cc:** Anderson, Lea <[anderson.lea@epa.gov](mailto:anderson.lea@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>  
**Subject:** RE: Revised MATS NPRM and Cost TSD for OMB Passback

Thanks Paul. Are these all of the changes made since the last draft was sent to OMB?

# Ex. 5 Attorney Client (AC)

---

**From:** Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>  
**Sent:** Monday, September 20, 2021 7:19 PM  
**To:** Weaver, Susannah <[Weaver.Susannah@epa.gov](mailto:Weaver.Susannah@epa.gov)>; Srinivasan, Gautam <[Srinivasan.Gautam@epa.gov](mailto:Srinivasan.Gautam@epa.gov)>; Marks, Matthew <[Marks.Matthew@epa.gov](mailto:Marks.Matthew@epa.gov)>  
**Cc:** Anderson, Lea <[anderson.lea@epa.gov](mailto:anderson.lea@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>  
**Subject:** FW: Revised MATS NPRM and Cost TSD for OMB Passback

FYI.

---

**From:** Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)>  
**Sent:** Monday, September 20, 2021 6:03 PM  
**To:** Hutson, Nick <[Hutson.Nick@epa.gov](mailto:Hutson.Nick@epa.gov)>  
**Cc:** Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>; Macpherson, Alex <[Macpherson.Alex@epa.gov](mailto:Macpherson.Alex@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>; Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>; Eschmann, Erich <[Eschmann.Erich@epa.gov](mailto:Eschmann.Erich@epa.gov)>; Dolwick, Pat <[Dolwick.Pat@epa.gov](mailto:Dolwick.Pat@epa.gov)>; King, Melanie <[King.Melanie@epa.gov](mailto:King.Melanie@epa.gov)>  
**Subject:** Revised MATS NPRM and Cost TSD for OMB Passback

Nick – Attached, for sending to OMB tomorrow morning (file names include tomorrow's date), are RLSO versions of the MATS NPRM and Cost TSD. The documents address the second round of interagency comments as well as incorporate some additional EPA-suggested clarifying edits.

---

**From:** Hutson, Nick <[Hutson.Nick@epa.gov](mailto:Hutson.Nick@epa.gov)>  
**Sent:** Monday, September 20, 2021 5:46 PM  
**To:** Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)>  
**Cc:** Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>; Macpherson, Alex <[Macpherson.Alex@epa.gov](mailto:Macpherson.Alex@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>; Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>; Eschmann, Erich <[Eschmann.Erich@epa.gov](mailto:Eschmann.Erich@epa.gov)>  
**Subject:** Re: please review edits to TSD

Tomorrow morning is fine.

Nick

Sent from my iPhone

On Sep 20, 2021, at 5:42 PM, Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)> wrote:

Nick – Do you want to send the 2 docs to OMB tonight or tomorrow morning?

---

**From:** Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>  
**Sent:** Monday, September 20, 2021 5:40 PM  
**To:** Macpherson, Alex <[Macpherson.Alex@epa.gov](mailto:Macpherson.Alex@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)>; Hutson, Nick <[Hutson.Nick@epa.gov](mailto:Hutson.Nick@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>; Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>  
**Cc:** Eschmann, Erich <[Eschmann.Erich@epa.gov](mailto:Eschmann.Erich@epa.gov)>  
**Subject:** RE: please review edits to TSD

Thanks Alex, that should do it.

---

**From:** Macpherson, Alex <[Macpherson.Alex@epa.gov](mailto:Macpherson.Alex@epa.gov)>  
**Sent:** Monday, September 20, 2021 5:40 PM  
**To:** Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>; Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)>; Hutson, Nick <[Hutson.Nick@epa.gov](mailto:Hutson.Nick@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>; Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>  
**Cc:** Eschmann, Erich <[Eschmann.Erich@epa.gov](mailto:Eschmann.Erich@epa.gov)>  
**Subject:** RE: please review edits to TSD

I put this in the preamble and a similar statement in the cost TSD

## Ex. 5 Attorney Client (AC)

---

**From:** Sasser, Erika <[Sasser.Erika@epa.gov](mailto:Sasser.Erika@epa.gov)>  
**Sent:** Monday, September 20, 2021 5:39 PM  
**To:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>; Macpherson, Alex <[Macpherson.Alex@epa.gov](mailto:Macpherson.Alex@epa.gov)>; Johnson, Mary <[Johnson.Mary@epa.gov](mailto:Johnson.Mary@epa.gov)>; Hutson, Nick <[Hutson.Nick@epa.gov](mailto:Hutson.Nick@epa.gov)>; Ting, Kaytrue <[Ting.Kaytrue@epa.gov](mailto:Ting.Kaytrue@epa.gov)>; Versace, Paul <[Versace.Paul@epa.gov](mailto:Versace.Paul@epa.gov)>  
**Cc:** Eschmann, Erich <[Eschmann.Erich@epa.gov](mailto:Eschmann.Erich@epa.gov)>  
**Subject:** RE: please review edits to TSD

## Ex. 5 Attorney Client (AC)

**From:** Culligan, Kevin <[Culligan.Kevin@epa.gov](mailto:Culligan.Kevin@epa.gov)>  
**Sent:** Monday, September 20, 2021 5:33 PM

**To:** Macpherson, Alex <Macpherson.Alex@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>; Hutson, Nick <Hutson.Nick@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>; Sasser, Erika <Sasser.Erika@epa.gov>  
**Cc:** Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

## Ex. 5 Attorney Client (AC)

**From:** Macpherson, Alex <Macpherson.Alex@epa.gov>  
**Sent:** Monday, September 20, 2021 5:28 PM  
**To:** Johnson, Mary <Johnson.Mary@epa.gov>; Hutson, Nick <Hutson.Nick@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>; Culligan, Kevin <Culligan.Kevin@epa.gov>; Sasser, Erika <Sasser.Erika@epa.gov>  
**Cc:** Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

+ Erika and Kevin

## Ex. 5 Attorney Client (AC)

Please advise. Thanks  
Alex

**From:** Johnson, Mary <Johnson.Mary@epa.gov>  
**Sent:** Monday, September 20, 2021 4:52 PM  
**To:** Macpherson, Alex <Macpherson.Alex@epa.gov>; Hutson, Nick <Hutson.Nick@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>  
**Cc:** Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

## Ex. 5 Attorney Client (AC)

Thanks.  
Mary

**From:** Macpherson, Alex <Macpherson.Alex@epa.gov>  
**Sent:** Monday, September 20, 2021 4:50 PM  
**To:** Hutson, Nick <Hutson.Nick@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>  
**Cc:** Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

OK, fine with me

Alex

**From:** Hutson, Nick <Hutson.Nick@epa.gov>  
**Sent:** Monday, September 20, 2021 4:49 PM

**To:** Macpherson, Alex <Macpherson.Alex@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>  
**Cc:** Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

## Ex. 5 Attorney Client (AC)

Nick

*Nick Hutson, PhD*

Group Leader  
Energy Strategies Group  
Office of Air Quality Planning & Standards  
U.S. Environmental Protection Agency  
Research Triangle Park, NC 27711  
Office: 919 541 2968

**Ex. 6 Personal Privacy (PP)**

email: [hutson.nick@epa.gov](mailto:hutson.nick@epa.gov)

---

**From:** Macpherson, Alex <Macpherson.Alex@epa.gov>  
**Sent:** Monday, September 20, 2021 3:33 PM  
**To:** Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>  
**Cc:** Hutson, Nick <Hutson.Nick@epa.gov>; Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

Thanks Paul and Kaytrue

## Ex. 5 Attorney Client (AC)

Alex

---

**From:** Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Sent:** Monday, September 20, 2021 3:06 PM  
**To:** Versace, Paul <Versace.Paul@epa.gov>; Macpherson, Alex <Macpherson.Alex@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>  
**Cc:** Hutson, Nick <Hutson.Nick@epa.gov>; Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

## Ex. 5 Attorney Client (AC)

U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-6380  
E: [ting.kaytrue@epa.gov](mailto:ting.kaytrue@epa.gov)

---

**From:** Versace, Paul <Versace.Paul@epa.gov>  
**Sent:** Monday, September 20, 2021 2:57 PM  
**To:** Macpherson, Alex <Macpherson.Alex@epa.gov>; Johnson, Mary <Johnson.Mary@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Cc:** Hutson, Nick <Hutson.Nick@epa.gov>; Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

### Ex. 5 Attorney Client (AC)

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**From:** Macpherson, Alex <Macpherson.Alex@epa.gov>  
**Sent:** Monday, September 20, 2021 2:56 PM  
**To:** Johnson, Mary <Johnson.Mary@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Cc:** Hutson, Nick <Hutson.Nick@epa.gov>; Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

### Ex. 5 Attorney Client (AC)

---

**From:** Johnson, Mary <Johnson.Mary@epa.gov>  
**Sent:** Monday, September 20, 2021 2:53 PM  
**To:** Versace, Paul <Versace.Paul@epa.gov>; Macpherson, Alex <Macpherson.Alex@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Cc:** Hutson, Nick <Hutson.Nick@epa.gov>; Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

### Ex. 5 Attorney Client (AC)

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**From:** Versace, Paul <Versace.Paul@epa.gov>  
**Sent:** Monday, September 20, 2021 2:35 PM  
**To:** Macpherson, Alex <Macpherson.Alex@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Cc:** Johnson, Mary <Johnson.Mary@epa.gov>; Hutson, Nick <Hutson.Nick@epa.gov>; Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

### Ex. 5 Attorney Client (AC)

---

**From:** Macpherson, Alex <Macpherson.Alex@epa.gov>  
**Sent:** Monday, September 20, 2021 1:14 PM  
**To:** Versace, Paul <Versace.Paul@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Cc:** Johnson, Mary <Johnson.Mary@epa.gov>; Hutson, Nick <Hutson.Nick@epa.gov>; Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

Paul, Kaytrue

I just sent you a new link to the CoST TSD

Alex

---

**From:** Versace, Paul <Versace.Paul@epa.gov>  
**Sent:** Monday, September 20, 2021 12:52 PM  
**To:** Macpherson, Alex <Macpherson.Alex@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>  
**Cc:** Johnson, Mary <Johnson.Mary@epa.gov>; Hutson, Nick <Hutson.Nick@epa.gov>; Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** RE: please review edits to TSD

Please send a link so I make sure to review the correct version.

---

**From:** Macpherson, Alex <Macpherson.Alex@epa.gov>  
**Sent:** Monday, September 20, 2021 12:25 PM  
**To:** Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Versace, Paul <Versace.Paul@epa.gov>  
**Cc:** Johnson, Mary <Johnson.Mary@epa.gov>; Hutson, Nick <Hutson.Nick@epa.gov>; Eschmann, Erich <Eschmann.Erich@epa.gov>  
**Subject:** please review edits to TSD

Kaytrue, Paul

# Ex. 5 Attorney Client (AC)

Alex

Alex Macpherson  
US EPA, 919-541-9770

Message

---

**From:** Culligan, Kevin [Culligan.Kevin@epa.gov]  
**Sent:** 9/27/2021 2:42:14 PM  
**To:** Carbonell, Tomas [Carbonell.Tomas@epa.gov]  
**Subject:** FW: EO12866 Oil and Gas Climate Review (AV15 & AV16) - RIA  
**Attachments:** Compiled Comments (2060-AV15 & 2060-AV16)\_reviewer1.docx; EO12866\_Oil and Gas NSPS EG Climate Review 2060-AV15 and 2060-AV16 PROPOSAL 20210917 - reviewer2.docx; EO12866\_Oil and Gas NSPS EG Climate Review 2060-AV15 and 2060-AV16 PROPOSAL 20210917- reviewer3.docx; EO12866\_Oil and Gas NSPS EG Climate Review 2060-AV15 and 2060-AV16 PROPOSAL 20210917\_reviewer4.docx; EO12866\_Oil and Gas NSPS EG Climate Review 2060-AV15 and 2060-AV16 RIA\_20210917 - reviewer2.docx; EO12866\_Oil and Gas NSPS EG Climate Review 2060-AV15 and 2060-AV16 reviewer1.docx; EO12866\_Oil and Gas NSPS EG Climate Review 2060-AV15 and 2060-AV16 longform comment reviewer2.docx

**Flag:** Follow up

We are going to be working through these and will hopefully highlight the most important for your attention.

---

**From:** Hodson Marten, Elke L. EOP/OMB **Ex. 6 Personal Privacy (PP)**  
**Sent:** Friday, September 24, 2021 4:34 PM  
**To:** Marsh, Karen <Marsh.Karen@epa.gov>  
**Cc:** Culligan, Kevin <Culligan.Kevin@epa.gov>; Cozzie, David <Cozzie.David@epa.gov>; Iglesias, Amber <Iglesias.Amber@epa.gov>; Adams, Darryl <Adams.Darryl@epa.gov>; Gilbreath, Jan <Gilbreath.Jan@epa.gov>; Lassiter, Penny <Lassiter.Penny@epa.gov>; Sasser, Erika <Sasser.Erika@epa.gov>; Hambrick, Amy <Hambrick.Amy@epa.gov>  
**Subject:** RE: EO12866 Oil and Gas Climate Review (AV15 & AV16) - RIA

All, attaching the agency comments received so far.

Best, Elke

## Message

**From:** Culligan, Kevin [Culligan.Kevin@epa.gov]  
**Sent:** 10/22/2021 3:34:44 AM  
**To:** Carbonell, Tomas [Carbonell.Tomas@epa.gov]  
**Subject:** Fwd: EO12866 Oil and Gas Climate Review (AV15 & AV16) - Preamble Pass Back  
**Attachments:** EO12866\_Oil and Gas NSPS EG Climate Review 2060-AV15 and 2060-AV16 PROPOSAL\_20211019 - RLSO.docx;  
EO12866\_Oil and Gas NSPS EG Climate Review 2060-AV15 and 2060-AV16 PROPOSAL\_20211019.docx

Sent from my iPhone

Begin forwarded message:

**From:** "Marsh, Karen" <Marsh.Karen@epa.gov>  
**Date:** October 19, 2021 at 4:58:49 PM EDT  
**To:** "Hodson Marten, Elke L. EOP/OMB" <[REDACTED]> **Ex. 6 Personal Privacy (PP)**  
**Cc:** "Culligan, Kevin" <Culligan.Kevin@epa.gov>, "Cozzie, David" <Cozzie.David@epa.gov>, "Iglesias, Amber" <Iglesias.Amber@epa.gov>, "Adams, Darryl" <Adams.Darryl@epa.gov>, "Gilbreath, Jan" <Gilbreath.Jan@epa.gov>, "Lassiter, Penny" <Lassiter.Penny@epa.gov>, "Sasser, Erika" <Sasser.Erika@epa.gov>, "Hambrick, Amy" <Hambrick.Amy@epa.gov>  
**Subject:** EO12866 Oil and Gas Climate Review (AV15 & AV16) - Preamble Pass Back

Elke,

Please find attached two (2) files for the updated preamble for the oil and gas climate review proposals (AV15 and AV16). These attachments include: (1) clean updated preamble word file, and (2) RLSO updated preamble word file compared to the 9/17 submission and comments received from interagency reviewers.

## Ex. 5 Deliberative Process (DP)

Additionally, a few comments were provided via email and outside of the preamble itself. Responses to those comments are provided here.

### OMB Comments From Email/Separate Document

## Ex. 5 Deliberative Process (DP)

# Ex. 5 Deliberative Process (DP)

Let me know if you have any questions.

Thanks,  
Karen

\*\*\*\*\*

Karen R. Marsh, PE  
US EPA, OAQPS, Sectors Policies and Programs Division  
Fuels and Incineration Group  
109 TW Alexander Drive, Mail Code E143-05  
Research Triangle Park, NC 27711  
Direct: (919) 541-1065; email: [marsh.karen@epa.gov](mailto:marsh.karen@epa.gov)

Message

---

**From:** Weaver, Susannah [Weaver.Susannah@epa.gov]  
**Sent:** 11/19/2021 12:32:36 PM  
**To:** Carbonell, Tomas [Carbonell.Tomas@epa.gov]  
**Subject:** 111 option  
**Attachments:** Confidential--Statutory Interpretation options.docx

**Flag:** Follow up

Confidential—Attorney-Client—Deliberative

Hi Tomás,

I hope you are doing well. I've attached a quick-and-dirty write up that I did regarding 111 statutory interpretation options. No one has reviewed it—I intend to give it to Melissa later today. If you have time, I'd really appreciate your views on it—both in terms of the content (it's been a while since I was in the guts of this) and whether you think it is a useful exercise. Happy to chat about it too.

Thanks,  
Susannah

Susannah Landes Weaver  
Senior Counselor  
Office of General Counsel  
Environmental Protection Agency  
(202) 564-1928 (office)

**Ex. 6 Personal Privacy (PP)**

**Joseph, Wanda**

---

**From:** Mulrine, Phil  
**Sent:** Thursday, October 28, 2021 9:20 AM  
**To:** Joseph, Wanda  
**Cc:** French, Chuck; Gates, Adrian  
**Subject:** RE: Comments on FAR draft of Hg cell preamble.

Wanda,

Attached is the email for OGC concurrence.

Phil

---

**From:** French, Chuck <French.Chuck@epa.gov>  
**Sent:** Wednesday, October 20, 2021 11:22 AM  
**To:** Gates, Adrian <gates.adrian@epa.gov>; Joseph, Wanda <joseph.wanda@epa.gov>  
**Cc:** Mulrine, Phil <Mulrine.Phil@epa.gov>  
**Subject:** FW: Comments on FAR draft of Hg cell preamble.

Hi All, Below is the email from OGC stating that they concur with package moving forward to OMB review.

---

**From:** Thrift, Mike <thrift.mike@epa.gov>  
**Sent:** Wednesday, October 20, 2021 11:08 AM  
**To:** French, Chuck <French.Chuck@epa.gov>; Mulrine, Phil <Mulrine.Phil@epa.gov>  
**Subject:** RE: Comments on FAR draft of Hg cell preamble.

Got it. Wasn't aware of that new process step.

OAQPS has addressed my comments and OGC concurs with the package moving forward to OMB review.

---

**From:** French, Chuck <French.Chuck@epa.gov>  
**Sent:** Tuesday, October 19, 2021 5:04 PM  
**To:** Thrift, Mike <thrift.mike@epa.gov>; Mulrine, Phil <Mulrine.Phil@epa.gov>  
**Subject:** RE: Comments on FAR draft of Hg cell preamble.

I think the previous email (on 10/5) was for FAR and it said that you concur with comments. Correct? Anyway, that is helpful. However, our front office likes (or requires) an another email that says that we have addressed your comments and that OGC concurs with the package moving forward to next step, which in this case is OMB review. OK?

---

**From:** Thrift, Mike <thrift.mike@epa.gov>  
**Sent:** Tuesday, October 19, 2021 7:55 PM  
**To:** French, Chuck <French.Chuck@epa.gov>; Mulrine, Phil <Mulrine.Phil@epa.gov>  
**Subject:** RE: Comments on FAR draft of Hg cell preamble.

Thought I did already. Need another one just for these last edits?

---

**From:** French, Chuck <French.Chuck@epa.gov>  
**Sent:** Tuesday, October 19, 2021 3:32 PM

**To:** Thrift, Mike <[thrift.mike@epa.gov](mailto:thrift.mike@epa.gov)>; Mulrine, Phil <[Mulrine.Phil@epa.gov](mailto:Mulrine.Phil@epa.gov)>

**Subject:** RE: Comments on FAR draft of Hg cell preamble.

Hi Mike,

Thanks! Can you send us an email stating that OGC concurs with final rule package moving to OMB for OMB review?

Thanks!

Chuck

---

**From:** Thrift, Mike <[thrift.mike@epa.gov](mailto:thrift.mike@epa.gov)>

**Sent:** Tuesday, October 19, 2021 3:48 PM

**To:** French, Chuck <[French.Chuck@epa.gov](mailto:French.Chuck@epa.gov)>; Mulrine, Phil <[Mulrine.Phil@epa.gov](mailto:Mulrine.Phil@epa.gov)>

**Subject:** RE: Comments on FAR draft of Hg cell preamble.

Edits all look fine to me, Chuck.

## Message

**From:** Hoffer, Melissa [Hoffer.Melissa@epa.gov]  
**Sent:** 12/27/2021 7:59:10 PM  
**To:** Carbonell, Tomas [Carbonell.Tomas@epa.gov]; Katims, Casey [Katims.Casey@epa.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]  
**Subject:** Fwd: Temporary Emergency Suspension re: PacifiCorp's Jim Bridger Power PlantGood Morning: Attached please find a Temporary Emergency Suspension signed by Governor Mark Gordon regarding PacifiCorp's Jim Bridger Power Plant. The Wyoming Attorney General'...  
**Attachments:** Emergency Suspension Letter, Attachments.pdf

Sent from my iPhone

Begin forwarded message:

**From:** "Prieto, Jeffrey" <Prieto.Jeffrey@epa.gov>  
**Date:** December 27, 2021 at 1:53:40 PM EST  
**To:** "Payne, James (Jim)" <payne.james@epa.gov>, "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>, "Marks, Matthew" <Marks.Matthew@epa.gov>  
**Cc:** "Hoffer, Melissa" <hoffer.melissa@epa.gov>  
**Subject:** **FW: Temporary Emergency Suspension re: PacifiCorp's Jim Bridger Power PlantGood Morning: Attached please find a Temporary Emergency Suspension signed by Governor Mark Gordon regarding PacifiCorp's Jim Bridger Power Plant. The Wyoming Attorney General's Of**

Hi Jim, Gautam, and Matt:

FYI. I also shoot a note over to Todd and Mike (Todd's CoS).

Best to you all!

Jeff

Jeffrey M. Prieto  
 General Counsel  
 U.S. Environmental Protection Agency  
 Office of General Counsel  
 1200 Pennsylvania Avenue, NW  
 Washington, DC 20460  
 T: 202-564-8040  
 E: Prieto.jeffrey@epa.gov

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From: Becker, KC <Becker.KC@epa.gov>  
 Sent: Monday, December 27, 2021 1:48 PM

To: Prieto, Jeffrey <Prieto.Jeffrey@epa.gov>; Niebling, William <Niebling.William@epa.gov>; Goffman, Joseph <Goffman.Joseph@epa.gov>; Hoffer, Melissa <Hoffer.Melissa@epa.gov>  
Cc: Thomas, Deb <thomas.debrah@epa.gov>  
Subject: FW: Temporary Emergency Suspension re: PacifiCorp's Jim Bridger Power Plant  
Good Morning:  
Attached please find a Temporary Emergency Suspension signed by Governor Mark Gordon regarding PacifiCorp's Jim Bridger Power Plant. The Wyoming Attorney General's Of

Jeff, William, Joe, and Melissa: I want to make sure this was brought to your attention today, from Wyoming Governor Gordon.

KC Becker  
Regional Administrator  
Office of the Regional Administrator (8-ORA)  
1595 Wynkoop St. Denver Co. 80202  
(303) 312-6170 - office  
Becker.KC@epa.gov<mailto:Becker.KC@epa.gov>

From: Cheryl Lobb <cheryl.lobb@wyo.gov<mailto:cheryl.lobb@wyo.gov>>  
Sent: Monday, December 27, 2021 11:13 AM  
To: Becker, KC <Becker.KC@epa.gov<mailto:Becker.KC@epa.gov>>  
Cc: James Kaste <james.kaste@wyo.gov<mailto:james.kaste@wyo.gov>>  
Subject: Temporary Emergency Suspension re: PacifiCorp's Jim Bridger Power Plant  
Good Morning: Attached please find a Temporary Emergency Suspension signed by Governor Mark Gordon regarding PacifiCorp's Jim Bridger Power Plant. The Wyoming Attorney General's Off...

Good Morning:

Attached please find a Temporary Emergency Suspension signed by Governor Mark Gordon regarding PacifiCorp's Jim Bridger Power Plant. The Wyoming Attorney General's Office is sending this Emergency Suspension on behalf of Governor Gordon. EPA Administrator Michael Regan was provided notice of this Emergency Suspension today.

If you have any questions, or concerns, please feel free to contact me at 307-777-7895.

Cheryl L. Lobb  
Paralegal  
Office of the Attorney General  
Water and Natural Resources Division  
109 State Capitol  
Cheyenne, WY 82002  
307.777.7895  
307.777.3542 (fax)

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Message

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**From:** Marks, Matthew [Marks.Matthew@epa.gov]  
**Sent:** 1/19/2022 1:23:01 AM  
**To:** Hoffer, Melissa [Hoffer.Melissa@epa.gov]; Weaver, Susannah [Weaver.Susannah@epa.gov]; Carbonell, Tomas [Carbonell.Tomas@epa.gov]  
**Subject:** ACE brief  
**Attachments:** 20-1530bsUnitedStates.pdf

Hi Melissa/Susannah/Tomas,

I'm sure you're interested in seeing the United States' final as-filed brief in the ACE Supreme Court litigation. Obviously no recusal issue as the brief is now final and public.

Best,

Matt

---

**Matthew C. Marks**  
Deputy Associate General Counsel  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
T: 202-564-3276

Ex. 6 Personal Privacy (PP)

E: [marks.matthew@epa.gov](mailto:marks.matthew@epa.gov)